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# SUBROGATION AND LIMITATION*

Subrogation is defined in *Wilkins* v. *Gibson* (1) by Justice Cobb as "arising in cases where the party claiming the right advanced money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." So defined, subrogation is either legal or conventional. Legal subrogation into the rights of a creditor takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor or for a purchaser who extinguishes the encumbrances upon the estate or of a co-obligor or surety who discharges the debt or of an heir who pays the debts of succession [*Shin* v. *Budd* (2)]. In India, the only cases of legal subrogation are provided for by Ss. 74 and 95 of the Transfer of Property Act and the rest of the cases have to be decided under general principles of law. Conventional subrogation, on the other hand, arises under an express agreement that the person paying the debt would be subrogated to the rights and remedies of the original creditor. The nature and incidents of legal and conventional subrogation have been well discussed by Mukerji, J., in *Gurdeo Singh* v. *Chandrikah Singh* (3).

In the case of a mortgage, subrogation or substitution by operation of law to the rights and interest of the mortgagee is by redemption and the question of legal subrogation is studied with reference to S. 91 of the Transfer of Property Act where the list of persons interested in the equity of redemption is given.

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*A paper read under the auspices of the Bar Association, Cocanada, by Mr. K. Raghavacharyulu, M. A., B. L.

1. (1901) 113 Georgia 31 : 38 S E 374. 2. (1862) 14 N J Eq. 234.
3. (1907) I L R 36 C 193.

The right to redeem and the consequential rights are thus mainly statutory. Many interesting and complex problems arise for consideration in a discussion of the law of subrogation, viz., (1) who are entitled to the right of subrogation; (2) whether the right can be enforced in the same proceedings or whether a separate suit has to be filed; (3) whether partial subrogation can be allowed; (4) whether the subrogee is entitled to an assignment of the mortgage rights; (5) the amount that can be claimed by subrogation; and (6) the question of limitation within which the right could be enforced. Each of these questions is so very complex that the High Courts have not only differed from each other in the consideration thereof but different benches of the same High Court have after a good deal of deliberation thought fit to pronounce diametrically opposite judgments under similar circumstances. The right of a puisne mortgagee to redeem has been considered only to be a right ancillary to that of working out his remedy against the mortgaged estate by foreclosure. It must be considered only a means of "securing the object of enforcing his own claim by sale." This view had a far-reaching effect as regards the time within which he could redeem the prior mortgagee. The decision in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (4) followed in later cases by Krishnan, J., in *Appayya* v. *Venkataramayya* (5) and Madhavan Nair, J., in *Lakshmanan Chettiar* v. *Sellamuthu Naicker* (6) has laid down that a subsequent mortgagee coming to redeem after 12 years from the due date of his own mortgage was barred. The right of subrogation with reference to a third party who took a mortgage to pay off a prior mortgage debt has not been uniformly decided and his right to use the latter security for his own benefit has been denied in *Kandaswami* v. *Venkata* (7) by Spencer and Ramesam, JJ., but allowed by Devadoss, J., in *Avudai Ammal* v. *Chinna Ramaswami Naick* (8) following the English case of *Butler* v. *Rice* (9). The Calcutta High Court in the recent case of *Gobinda Chandra Basak* v. *Parasram* (10) (Greaves and Cuming, JJ.) allowed subrogation following the English cases of *Butler* v. *Rice* (9) and *Chetwynd* v. *Allen* (11).

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4. (1909) 14 C W N 439.
5. (1924) 20 L W 620.
6. (1924) 47 M L J 602.
7. (1925) 22 L W 238 : A I R 1925 M 1219.
8. A I R 1925 M 129.
9. (1910) 2 Ch. 277.
10. A I R 1926 C 231 : 89 I C 116.
11. (1899) 1 Ch. 353.

The question of limitation in suits relating to subrogation has to be studied with reference to subrogation considered as a right enforceable by way of suit and subrogation used as a shield in defence. The first is the subject-matter of case-law under Ss. 74 and 95 of the Transfer of Property Act and the second has reference to the doctrine of keeping alive under S. 101.

The case of subrogation enforceable as a right and the question of limitation thereto seems to have been at first sight fairly concluded by the Privy Council case *Mahomed Ibrahim* v. *Ambika Prasad* (12). Such a right arises, as has been already noticed, in the case of a puisne mortgagee (S. 74), a co-mortgagor (S. 95), a surety, a purchaser of the mortgaged premises though the purchase might afterwards be set aside, tenants for life and lessees. The statutory charge given to a co-mortgagor has been extended in a number of cases by analogy to persons who under S. 82 of the Transfer of Property Act file suits for contribution, *Dhakeshwar Prasad Singh* v. *Harihar Prasad* (13), *Kashi Ram* v. *Het Singh* (14), *Sri Maharaja Parbhu Narain Singh* v. *Babu Beni Singh* (15) and *Har Prasad* v. *Raghunandan Prasad* (16). The Indian High Courts have uniformly given a charge in cases arising under S. 82, T. P. Act. Ghose in his Law of Mortgages thinks that the plaintiff in such cases occupies the position of an assignee of the original security the character of which is not altered when the debt is discharged. But he doubts whether the extension of a charge analogous to that under S. 95 is a legitimate process (pages 396 and 397, 5th Edition).

S. 74, T. P. Act, enunciates the rule that "the subsequent mortgagee shall acquire in respect of the property all the rights and powers of the mortgagee as such, to whom he has made the tender". S. 95, T. P. Act, says that "a co-mortgagor who redeems the mortgaged property and obtains possession thereof has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." In the first place, S. 95 uses the word "charge" in reference to a co-mortgagor who redeems the mortgaged property. Secondly, the clause "who redeems the mortgaged property and obtains possession"

12. (1912) I L R 39 C 527 (P C). 13. (1914) 21 C L J 104.
14. (1914) I L R 37 A 101. 15. (1909) 14 C W N 361,
16. (1908) I L R 31 A 166.

has occasioned a good deal of trouble in the interpretation thereof. Ghose in his Law of Mortgages (p. 372) and Chatterji, J., in *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (17) refer to the section as unskilfully drawn up and clumsily worded. The conflict as to whether the section should be limited to cases of usufructuary mortgage was at last set at rest by the Privy Council case *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (18) where it was held that "the section should be construed distributively to make the condition of obtaining possession apply only to cases in which the fulfilment is from the nature of the mortgage possible and in other cases to make the charge follow upon redemption." The conflict as to what is meant by a charge, whether the co-mortgagor would be entitled to the rights of the mortgagee as such as under S.74, T. P. Act, is as yet not finally settled. It is necessary to discuss this question with reference to the converse case of redemption by a co-mortgagor.

As regards subrogation enforceable as a right in the case of a co-mortgagor, the Courts have in spite of the use of the word 'charge' in S. 95 held that there is no difference in principle between the cases of a subsequent mortgagee, a purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage and that the same principles of equity and justice apply [vide *Raj Kamini Debi* v. *Mukanda Lal* (17) per Chatterji, J.]

We have next to consider the question of limitation to enforce the right of subrogation in suits by a puisne mortgagee, auction purchaser, etc. The questions that arise in this connection are (*i*) whether the subrogee in such cases is an assignee of the mortgagee's rights, (*ii*) what is the starting point of limitation, and (*iii*) the time-limit within which it should be enforced. The Privy Council in *Mahomed Ibrahim* v. *Ambika Prasad* (12) held that the plaintiff who paid the 1st mortgagee (It may be noted that the mortgage in this case did not ripen into a decree) must come within 12 years of the date when the 1st mortgage is payable and that consequently plaintiff's right of subrogation was barred under Art. 132, Limitation Act. This case has been distinguished in a number of cases [refer *Shib Lal* v. *Munni Lal* (19),

12. (1912) I L R 39 C 527 (P C). 17. (1920) 57 I C 868.
18. (1905) L R 32 I A 81 : 16 M L J 269 : I L R 28 A 482 (P C).
19. (1921) I L R 44 A 67.

*Parvati Ammal* v. *Venkatarama Aiyar* (20), *Suryabhan* v. *Renuka* (21) and *Narayan* v. *Nathmal* (22).]

The essence of the law of subrogation is that the party paying off a charge becomes in equity an assignee of the charge. The Patna High Court in *Sibanand Misra* v. *Jagmohan Lal* (23) has pointed out that the so-called subrogee has two rights, viz., (*i*) The right of reimbursement which arises on the date of payment and has to be discussed with reference to Ss.69 and 70, Indian Contract Act, and (2) the right of subrogation. Subrogation does not give him a fresh charge. The charge is already there and has to be enforced within the time prescribed (Das, J.).

In *Shib Lal* v. *Munni Lal* (19), the rights of the subrogee are held to be akin to an assignee's rights but there is no assignment express or implied. The rights of the subrogee could not accrue even before he paid any amount at all. The subrogee acquires a charge not on the date when the prior mortgage was made nor when that mortgage could be enforced but on the date when he pays off the amount due to the prior mortgage.

The judgment of Wallace, J. in *Parvati Ammal* v. *Venkatarama Aiyar* (20) strikes a *via media* between the interpretations above noticed. The subrogee is there held to be an equitable assignee of the charge entitled by a legal fiction to the charge as it stood on the date of the assignment. "It is difficult to see how an assignment can have the effect of so to speak setting back the hands of the clock of evolution and reviving a form out of which the charge has already developed so that the charge assigned is not the charge as on the date of assignment but some previous and outworn state thereof . . . The proper doctrine is that the subrogee steps into the shoes of the prior mortgagee at the point where he is standing and takes over whatever rights and remedies he possesses at the moment when the lien on the property is paid off. An assignee in equity cannot take something less than the rights of his assignor, since in the hands of the assignor the mortgage charge has taken a new lease of life through the decree while in the hands of the assignee it may be already dead. In *Mahomed Ibrahim* v. *Ambika Prasad* (12) the mortgage charge

12. (1912) I L R 39 C 527 (P C). 19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316. 21. (1925) 92 I C 118.
22. (1921) 65 I C 275. 23. (1922) 68 I C 707.

had not ripened into a decree and it is hardly in point." The learned Judge did not consider the question of limitation in this case but he observes that the charge so acquired should be enforced by a separate suit. In this judgment it would seem to be the opinion of Wallace, J., that the subrogee can enforce his right within 12 years of the date of the decree—the right being the right to bring the property to sale to discharge the decree debt. The learned Judge in the later case *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) explains his view and observes that he meant only three years from the date of the decree.

In *Nathuram* v. *Sheolal* (25) the Court held that the period of limitation is 12 years from the date of the prior mortgage or the date on which it can be enforced.

In the later case *Narayan* v. *Nathmal* (22) the subrogee was held to acquire the rights under the decree and not the rights under the original mortgage. In *Narayan* v. *Syed Hafiz* (26) the starting point was held to be the date when the prior mortgage fell due.

The question was referred to a Bench in *Suryabhan* v. *Renuka* (21) and the Court following *Shib Lal* v. *Munni Lal* (19) and approving the observations in *Parvati Ammal* v. *Venkatarama Aiyar* (20) held that the puisne mortgagee acquired rights under the decree. "Before the time comes for payment a claim on the basis of the mortgage might be time barred. The result would be that where the condition in the prior mortgage is one of foreclosure, the puisne mortgagee would have to pay the prior mortgage debt without being able to recover it from the mortgagor or be foreclosed and lose the amount advanced to the mortgagor. Art. 132 would apply, 12 years being counted from the date when the money became due. The money can be said to have become due to plaintiff and the right to foreclose in default of payment to have arisen in his favour only when he made the payment and became entitled under S. 74 to the rights under the decree. The Privy Council case does not apply as new rights were created under the decree."

19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316.
21. (1925) 92 I C 118.
22. (1921) 65 I C 275.
24. (1926) 52 M L J 532.
25. (1917) 42 I C 796.
26. (1923) 87 I C 264.

In *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) (Wallace and Madhavan Nair, JJ.) the Court held that the fact that a decree on the basis of the prior mortgage was obtained when the payment was made by the subsequent mortgagee did not make any difference in principle. The period of limitation is the same as that for a suit on the prior mortgage itself. *Mahomed Ibrahim* v. *Ambika Prasad* (12) was followed, *Parvati Ammal* v. *Venkatarama Aiyar* (20) explained and *Shib Lal* v. *Munni Lal* (19) was dissented from.

I have so far reviewed the case-law bearing upon the question of subrogation claimable as a right. I proceed to discuss the various observations in the above suits and point out that the doctrine enunciated in *Mahomed Ibrahim* v. *Ambika Prasad* (12) is highly anomalous and inequitable. It may be noted at the outset that the English law of subrogation does not point out any distinction in principle in cases arising under the head of legal subrogation whether it is the case of a puisne mortgagee, a co-mortgagor, an auction purchaser, or a surety. They are all treated as having been legally substituted in the place of the prior mortgagee. The English Law treats them as assignees in equity and the Indian Law, except for certain judgments of the Allahabad and Nagpur Courts which hold that their rights are akin to those of an assignee, treats them as assignees of the prior mortgagee's rights. Whether we consider them as assignees in equity or representatives of the prior mortgagee, we are confronted with a situation where their rights as assignees or representatives are denied to them. (1) The subrogee is denied the right of continuing the proceedings from the state at which the prior mortgagee has left them. We are concluded on this point by the Privy Council decision in *Gopi Narain* v. *Bansidhar* (27) and the Madras cases *Sundara Reddiar* v. *Subbiah Koundan* (28), *Parvati Ammal* v. *Venkatarama Aiyar* (20) and *Avudai Ammal* v. *Chinna Ramaswami Naick* (29). The *ratio decidendi* in those cases was that the decree obtained by the prior mortgagee being satisfied, no one can execute a satisfied decree. In spite of the observations of the Privy Council, the puisne mortgagee who was a party to the prior mortgagee's suit was al-

12. (1912) I L R 39 C 527 (P C). 19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316. 24. (1926) 52 M L J 532.
27. (1905) I L R 27 A 325. 28. (1912) 24 M L J 28.
29. A I R 1925 M 129.

lowed to continue the same proceedings in *Shanker Rao* v. *Ganpat Rao* (30) and *Loola* v. *Pyare* (31).

(2) The subrogee who is deemed to be an assignee for all practical purposes is again held to be an assignee of the rights under the prior mortgage and not of the rights under the decree. This view is obviously wrong. Whether as an assignee or as a representative, the subrogee is entitled to the rights of the prior mortgagee as on the date of payment. In cases where the prior mortgage rights ripened into those under the decree, it is contrary to all principles of justice and equity to hold that the subrogee gets the rights under the mortgage and not those under the decree. This 'sets back the hands of the clock of evolution' in the words of Wallace, J. Whereas in the hands of the prior mortgagee, the rights under the decree are kept alive the subrogee in respect of the prior mortgage may find them barred. This aspect could not be considered in the Privy Council case as the prior mortgage therein had been discharged before it reached the stage of a decree.

(3) The third reason why the law of subrogation allowing the subrogee only the rights under the mortgage is anomalous is this. Suppose the prior mortgagee filed a suit on the last day of limitation impleading the puisne mortgagee and brought the properties to sale. The puisne mortgagee or the auction purchaser whose sale happens to be set aside have to lose their remedy against the mortgagor or his representatives-in-interest. They get merely the rights allowed to them by law under Ss. 69 and 70 of the Contract Act. The charge they are supposed to have acquired by the operation of law and the application of the doctrine of subrogation is evidently unenforceable as being barred. A puisne mortgagee must thus perforce lose the amount he pays to the prior mortgagee or allow himself to be foreclosed under the prior mortgagee's decree.

(4) Where a co-sharer pays the entire revenue payable upon an estate and brings a suit for contribution the Madras High Court in *Raja of Vizianagram* v. *Rajah Setrucherla Somasekhararaju* (32) held that the co-sharer was entitled to a charge upon the shares of his other co-sharers but the charge was based on the equitable doctrine and not on

30. (1924) 80 I C 283. 31. (1915) 33 I C 496.
32. (1903) I L R 26 M 686 : 13 M L J 83 (F B).

the law of subrogation. They observed that the charge was originally in favour of the Crown only and the person who made the payment could not get it by operation of law express or implied. The scope of Ss. 82, 95 and 100 of the Transfer of Property Act, the English, American, and Irish Cases were discussed and the Full Bench decisions of the Calcutta and Allahabad High Courts were dissented from. (Refer to pages 697-712 of the learned judgment of Justice Bhashyam Aiyangar approved by the Full Bench.) The Full Bench held that such a co-sharer is entitled in equity to a charge upon the shares of the other co-sharers for the excess amount paid by him. As a matter of law he was not so entitled as S. 35 of the Revenue Recovery Act did not provide a charge in his case. That section only referred to a *bona fide* mortgagee or other encumbrancer or any person not being in possession of the estate but *bona fide* claiming an interest therein adverse to the defaulter.

I have discussed at length the scope of the decision in *Raja of Visianagram* v. *Rajah Setrucherla Somasekhararaju* (32) followed in the later cases of *Alayakammal* v. *Subbaroya Goundan* (33) and *Puthempurayal Amman Pariyayi* v. *Pakran Haji* (34) to point out the anomaly that a co-sharer who paid some money charged upon immoveable property and has *no legally enforceable charge* is *by the invocation of the doctrine of equity* given a charge within the meaning of Art. 132 of the Limitation Act capable of being enforced *within* 12 *years from the date of payment,* while in the case of a person who paid the amount due under a mortgage and *who is entitled in law to have a charge upon the property for the amount so paid,* is denied the right of enforcing it within 12 years of the date of payment.

Ghose in his Law of Mortgages at page 397 with reference to suits for contribution under S. 82 of the Transfer of Property Act says that there is a singular divergence of opinion in America with respect to the question of limitation, that the better opinion prevailing is that a person bound only to pay a portion of the mortgage debt acquires on redemption the same rights as the mortgagee, and that the period of limitation will not be either longer or shorter. It is hard to under-

32. (1903) I L R 26 M 686 : 13 M L J 83 (F B).
33. (1905) I L R 28 M 493 : 15 M L J 219.
34. (1912) 24 M L J 548.

stand why the learned author calls it the better opinion in view of the fact that subrogation itself is an equitable right and that the charge given by such a doctrine is rendered nugatory by the application of the law of limitation in many cases. The doctrine of subrogation, legal or conventional, was intended not only to safeguard the rights of persons who redeem a prior mortgagee but also to allow them a priority against subsequent encumbrancers and it is really deplorable that what is given with the right hand is snatched away by the left under the guise of limitation.

In this anomalous state of things, it is necessary that the legislature should interfere to protect the rights of auction-purchasers, puisne mortgagees and others interested in redeeming a prior mortgage. It would not be too much to suggest that Ss. 74, 82 and 95 may be consolidated as the principle underlying each of these sections is the same, thereby avoiding a discussion as to the difference in the wording of the different sections and thus giving all the persons interested in redemption the right of subrogation and priority which they are entitled to in equity. I would also suggest a new article to be introduced into the Limitation Act providing 12 years as the period of limitation from the date of payment in suits relating to subrogation. It would thus in equity be the best possible solution of all the complicated problems relating to the law of subrogation, as giving complete protection to the interests of innocent puisne encumbrancers and auction-purchasers.

Now coming to the question of subrogation held up as a shield in defence, it may be noted that the doctrine of Merger enunciated in *Toulmin* v. *Steere* (35) was held not to be applicable to India in the Privy Council case of *Gokaldoss* v. *Puranmal* (36) and even in England in the later cases of *Thorne* v. *Cann* (37) and *Liquidation Estates Purchase Co.* v. *Willoughby* (38) the doctrine has been doubted. S. 101, Transfer of Property Act, has made it clear that the prior mortgage can be kept alive where the intention is either express or implied and in all cases the presumption of keeping alive is drawn where it is for the benefit of the person claiming it.

There cannot be any limitation where the prior mortgage is kept alive as a shield. In fact all the cases with reference

35. (1817) 3 Mer. 210. 36. (1884) L R 11 I A 126 : I L R 10 C 1035 (P C)
37. (1895) A C 11 38. (1898) A C 321.

to this aspect of the question have been decided without any reference to the question of limitation. The Privy Council in *Het Ram* v. *Shadi Ram* (39) decided under S. 89 of the Transfer of Property Act that the decree in favour of the defendant prior mortgagee could not be held up as a shield as the decree was not executed and was barred by limitation, and the mortgage could not be set up as a shield as it contravened the provisions of S. 89, Transfer of Property Act. As the decree-holder slept without taking any steps under the decree and without bringing the property to sale, the Privy Council thought fit in equity to deny the right of keeping alive to such a mortgagee. In the later Privy Council cases *Musummat Sukhi* v. *Gulam Safdar Khan* (40), *Lala Matru Mal* v. *Durga Kunwar* (41) and in the Madras cases *Avathoraman Kutti* v. *Ittikaparambil Uthan* (42), *Chidambara Nadan* v. *Muni Nagendrayyan* (43) and *Suppan Sokkayya Bhattar* v. *Suppu Bhattar* (44) the prior mortgage was kept alive even beyond the period of limitation. In *Venkataramana Reddi* v. *Rangiah Chetti* (45) the question of limitation was raised and Sadasiva Aiyar, J., after carefully examining all the decisions bearing upon the question, held that the purchaser in execution of the 1st mortgage decree was entitled to set up the amount paid as a shield, irrespective of the question of limitation. The learned Judge quoted the words of Richards, C. J., in *Chhagan Lal* v. *Muhammad Husain Khan* (46). The very metaphor of the shield indicates the distinction. A man does not attack with the shield but defends with it. In *Sambhu bin Hanmanta* v. *Nama bin Narayan* (47) Chandavarkar, J., strikes a dissentient note. The learned Judge held that the lien of a person who paid the first mortgage came into existence on the date of payment and that the lien could not be set up as a shield by the defendant if 12 years had elapsed after the date of payment. It may be noted, however, that the observation of the learned Judge was *obiter,* the case being decided against the plaintiff on the ground that the defendant acquired rights by adverse possession having entered into possession in pursuance of an unregistered sale deed after discharging a prior mortgage on the property.

39. (1918) 35 M L J 1 (P C). 40. (1921) M W N 445 (P C).
41. (1920) M W N 338 (P C) 42. (1920) M W N 143.
43. (1920) M W N 534. 44. (1918) M W N 41.
45. (1920) M W N 15. 46. (1919) I L R 41 A 456 (F B).
47. (1911) I L R 35 B 438.

The law seems to be uniform except for the *obiter dictum* of Chandavarkar, J., in *Sambhu bin Hanmanta* v. *Nama bin Narayan* (47). But we are confronted with a recent decision of Madhavan Nair and Wallace, JJ., in *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) where a second mortgagee who had discharged a prior mortgage was held not entitled in a suit for redemption by a mortgagor to keep alive the first mortgage on the ground that his right to enforce the prior mortgage was barred as the suit was brought 12 years after the date when the prior mortgage became enforceable. This view is entirely unsound in view of the general law of subrogation relied upon as a shield in defence and in the light of the learned remarks of Sadasiva Aiyar, J., in *Pingali Venkatarama-na Reddi* v. *Kotigari Rangiah Chetti* (48) and in fact the Privy Council in *Lala Matru Mal* v. *Durga Kunwar* (41), the Madras High Court in *Avathoraman Kutti* v. *Ittikaparambil Uthan* (42) (Seshagiri Aiyar and Moore, JJ.), *Suppan Sokkayya Bhattar* v. *Suppu Bhattar* (44) (Wallis, C. J. and Ayling, J.) and other cases allowed the doctrine of 'Keeping alive' to be applied in cases where the 1st mortgage was clearly barred. A question of limitation properly arises in the case of a plaintiff who tries to enforce a right against the defendant and it is opposed to principles of justice and good conscience to hold that it applies to the rights claimed by the defendant in defence. The only exception to the rule is in the case of set off (O. 8, R. 6). But it is not an exception at all if we note that the statement in such cases is treated as a plaint and required to be stamped as a plaint. Even in such cases an equitable set off is allowed beyond time.

We may fairly well conclude in spite of the *obiter dictum* of Chandavarkar, J.. and the judgment of Madhavan Nair, J.. in *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) that the question of limitation does not arise where the prior mortgage is set up as a shield in defence.

Next we have seen that owing to the clumsy wording of S. 95 a conflict arose as to whether the section applied merely to cases where possession has been obtained by the subrogee. In deciding claims for contribution by co-mortgagors with

24. (1926) 52 M L J 532.

41. (1920) M W N 338 (P C). 42. (1920) M W N 143.

44. (1918) M W N 41. 47. (1911) I L R 35 B 438.

48. (1920) 70 I C 212 at 216.

reference to simple mortgages, the High Court held that Ss. 82 and 100 are the sections properly applicable [vide *Bhagwan Das* v. *Har Dei* (49) and *Har Prasad* v. *Raghunandan Prasad* (16)]. The conflict has been fortunately set at rest by the interpretation of the Privy Council in *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (18). The use of the word 'charge' in the section is again unhappy. A literal interpretation of the section would seem to mean that the co-mortgagor acquires a charge on the date of payment and that the period of 12 years prescribed by Art. 132 commenced from the date of payment. The absence of any such wording 'shall acquire in respect of the property all the rights and powers of the mortgagee as such' also indicates that the period of limitation is different for both the sections. But the Courts have held that in spite of the use of the word 'charge' the co-mortgagor is also a subrogee for the purpose of limitation. In spite of the application of the reasoning of S. 74 by analogy, the conflict was not happily set at rest. Subrogation arises by redemption and the subrogee is himself entitled to be redeemed by the other co-mortgagor under S. 95. If the co-mortgagor who redeems the prior mortgagee is a subrogee and has the rights of the prior mortgagee as such, it would be anomalous to hold that Art. 148 of the Limitation Act is not applicable to redeem such a co-mortgagor. In fact, the decisions of the different High Courts are singularly divergent on this point. The Allahabad High Court in *Khiali Ram* v. *Taik Ram* (50) and *Surat Singh* v. *Umrao Singh* (51), and the Calcutta High Court in *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (17) held that Art. 148 applied to such a case. The Calcutta High Court in *Purna Chandra Pal* v. *Barada Prosanna Bhattacharjya* (52), the Madras High Court in *Munia Goundan* v. *Ramasami Chetty* (53), the Patna High Court in *Ram Narain Rai* v. *Ram Deni Rai* (54), the Lahore High Court in *Wasir* v. *Girdhari* (55), the Bombay High Court in *Vasudev* v. *Balaji* (56) and subsequent cases have held that Art. 148 is not applicable as the co-mortgagor

16. (1908) I L R 31 A 166.
17. (1920) 57 I C 868. 18. (1905) L R 33 I A 81 : 16 M L J 269 (P C)
49. (1903) I L R 26 A 227.
50. (1916) I L R 38 A 540. 51. (1922) 20 A L J 611.
52. (1918) I L R 46 C 111. 53. (1918) I L R 41 M 650 : 34 M L J 528.
54. A I R 1923 Pat 98. 55. A I R 1923 Lah 311.
56. (1902) I L R 26 B 500.

by paying the prior mortgagee becomes only a charge-holder and Art. 144 is the proper article applicable. The conflict as already noted is mainly occasioned by the use of the word 'charge' in S. 95, Transfer of Property Act.

In conclusion it is suggested that the legislature should interfere and set at rest the conflict arising with regard to each of the questions above discussed at an early date so as to safeguard the interests of persons redeeming prior mortgages and claiming subrogation in respect of the same.

K. RAGHAVACHARYULU,
*Pleader, Cocoanada.*

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## SUMMARY OF ENGLISH CASES.

*In re* SIKES. MOXON *v.* CROSSLEY, (1927) 1 Ch. 364.

*Will—Construction—Bequest of 'my piano'—Piano subsequently sold and new one purchased—New piano whether passes to legatee.*

A testatrix provided by her will as follows:—"I bequeath my piano to *E* . . . " At the time she made her will she possessed a 'player' piano. Subsequently she sold the same and purchased a piano known as an electric motor player piano which she retained down to her death. The question arose whether the new piano passed to the legatee.

*Held* that when making the bequest of 'my piano' the testatrix referred to a particular thing and intended to give a particular piano then in her possession and no other, and that consequently the new piano did not pass to the legatee.

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*In re* A DEBTOR, (1927) 1 Ch. 410.

*Company—Liquidation—Managing Director obtaining judgment against company—Fraudulent preference—Liquidator's claim against Director—Set-off whether can be pleaded.*

"If a creditor of a company receives payment of the sum due to him in such circumstances that the payment amounts to a fraudulent preference, the position is that he has no right to receive his debt in full, but has a right only to be paid a dividend on his debt *pari passu* with the other creditors: the decision of the Court, in a winding up subsequently supervening, that the payment to him was a fraudulent preference, must necessarily amount to a decision that he had no right to receive his debt in

full, but had a right only, in the circumstances, to claim *pari passu* with the other creditors".

*Held,* that the Managing Director of a company in liquidation was not entitled to set-off against the claim of the liquidator for the money which he had wrongly received in full, a claim to be paid under his judgment an equivalent amount as a debt.

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*In re* ERRINGTON. GIBBS *v.* LASSAM, (1927) 1 Ch. 421.

*Will—Construction—Bequest of residuary estate—Codicil—Provision as to who should take after legatee's decease—Substitutional gift—Mode of distribution.*

A testator after reciting in his codicil that by his will his daughter *E* was entitled to one-third part of his residuary estate declared that she should be entitled only to the income of such estate and that after her decease the same should be divided between his daughters *J* and *S* or "if dead, between their issue, share and share alike". The testator died in 1888, *J* in 1925, and *E* one year thereafter. *J* left numerous children and grandchildren. The question arose how *E's* share was to be divided.

*Held,* that the codicil must be construed as if the testator provided that the property was to be divided between the two sisters, but that in the event of either being dead at the time of the distribution the issue of that one were to stand in her stead and take by way of substitutional gift; that only those of *J's* issue could be substituted who were living at her death or who were born after her during the lifetime of *E* and they would take in equal shares *per capita.*

In re *Hutchinson's Trusts,* (1882) 21 Ch. D. 811 applied.

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*In re* CHARTRES. FARMAN *v.* BARRETT, (1927) 1 Ch. 466.

*Will—Construction—Bequest to class—Class how to be determined—Rule of convenience.*

A testator bequeathed his residuary estate to his trustees and directed that the income for twenty-one years from his decease should be paid to his daughter and his son *R.* By another clause it was provided that after the expiration of the said period a portion of the trust funds was to be taken by the child or children or remoter issue of *R* in such manner as *R* by his will might direct and that in default of appointment for all *R's* children 'who being sons attain the age of twenty-one

years or being daughters attain that age or marry'. The testator died on March 11, 1905 so that the twenty-one years period expired on March 11, 1926. *R* had an only son born in March 1895. In 1924 *R* released his power of appointment. In 1925 *A* died having by his will appointed *F* and *R* as his executors and bequeathed the estate to them upon trust with a direction that the income after paying the funeral and other expenses should be paid to *R*.

*Held,* applying the rule of convenience that the class is to be determined at the earliest possible time, that *A's* executors were entitled to the estate and that *R's* future children if any will not be entitled to participate in the fund.

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SABATIER *v.* TRADING CO., (1927) 1 Ch. 495.

*Company—Foreign company having office in England—Administrative activities carried on—Business activities nowhere carried on—Action against company—Service of writ on Managing Director—Validity—Entry in register—Effect—Companies (Consolidation) Act, 1908, S. 274.*

Where a foreign company had an office in London at which certain administrative activities were being carried on and it appeared that there was no other place anywhere at which the company was carrying on trading activities and in an action against the company the writ was served on the Managing Director at the London Office.

*Held,* that the company must be held to be carrying on a business in England and that service of the writ on the Managing Director was proper service within the meaning of S. 274 of the Companies Act; that at any rate there was valid service because under the section if once a company had an established place of business in England it would be bound by the service, even if it ceased to carry on business, so long as the name of the nominee, the Managing Director in this case, remained on the register.

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KEPPEL *v.* WHEELER, (1927) 1 K. B. 577 (C A).

*Principal and Agent—Agent to sell property—Duty to disclose information to principal—Breach of duty—Damages*—Bona fide *mistake of agent—Commission when can be claimed.*

When agents are employed to find a purchaser for a property their position as agents cannot definitely end at any time

short of the time when a definite binding contract is entered into and exchanged: if in the interval they receive information which tends to show that the value of the property is greater than had been supposed or is otherwise of a nature to influence materially the judgment of the principal in going on with the contract they are bound to communicate that information to their principal; if they do not do so they are guilty of a breach of their duty as agents and are consequently liable for damages. The amount of damages is the difference between the amount which the vendee gave and the amount which the person making the subsequent offer would have given if the agents had done their duty.

*Held,* on the facts that as the agents had acted in good faith and as the transaction was completed and the principal had the benefit of it they were entitled to claim their commission.

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PUTSMAN *v.* TAYLOR, (1927) 1 K. B. 637.

*Restraint of trade—Agreement of service—Promise not to carry on trade for five years—Validity—Doctrine of severability.*

A contract of service provided that after the determination of the period of employment the employee should not for five years carry on any business similar to that of the employer or be employed by *D* or be employed in any capacity by any person, firm or company carrying on a business similar to that of the employee in places *A, B* or *C.*

*Held,* that the promise not to take service in place *A* for five years was not one in restraint of trade and that the same was enforceable as a distinct and severable contract.

*Per Salter, J.*—"The doctrine of severability is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise and the promise is a valid promise and supported by consideration the Court will enforce the promise notwithstanding the fact that the promisor had made other promises supported by the same consideration which are void and has included the valid and invalid promises in one document........ Whether the promise is a separate promise or not depends on the language of the document. We have to see whether the severance

alters the original meaning and effect of the agreement or only limits the sphere of its operations".

"The question whether a covenant in restraint of trade is unduly wide, though depending on questions of fact, is always treated as a matter of law. The limits in time and space, the nature and agreed duration of the employment, and all the circumstances must be considered together, the *onus* being on the employer to show that the covenant is not too wide".

[The decision was confirmed by the Court of Appeal on a construction of the entire covenant without regard to the doctrine of severability. *See* (1927) 1 K B 741.]

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BEHUKE *v.* BEDE SHIPPING CO., (1927) 1 K B 649.

*Sale of goods—'Goods' whether include ship—Contract for sale of ship—Specific performance—Sale of Goods Act,* 1893, *Ss.* 52 *and* 62.

The expression "goods" is defined in S. 62 of the Sale of Goods Act, 1893, as including "all chattels personal other than things in action and money".

*Held* that a ship is a chattel personal and comes within the definition of goods and that specific performance could be granted of a contract for the sale of a ship.

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LAGAN NAVIGATION CO. *v.* LAMBEG BLEACHING, DYEING AND FINISHING CO., (1927) A C 226.

*Nuisance—Abatement of—Raising banks of canal to prevent flooding—Adjoining lands flooded—Act whether amounts to nuisance—Statutory powers—Principles regulating abatement of nuisances.*

The plaintiffs the Lagan Navigation Company who were authorised by Statutes to keep a canal in good and substantial repair and in an efficient state for purposes of navigation raised the coping and embankment of one of their locks in order to prevent flood water coming down its reach. During a heavy flood in that part of the country the defendants who were owners of adjacent lands entered on the lock and cut channels right along the length of the lock on both sides so that the flood water might reach the lower reaches of the channel. In an action by the Lagan Navigation Company for an injunction and for damages:

*Held*, that the erection of the banks having been made under the statutory powers in order to secure the proper navigation of the lock, the plaintiffs were not guilty of creating a nuisance on their property; that assuming that the erection of the banks with the resultant flooding caused by them was a nuisance the defendants were not entitled without giving any notice of their intention to enter on the bank of the canal in the manner they did and cut drains on the lock.

*Per Lord Atkinson* :—"The abatement of a nuisance is a remedy which the law does not favour and is not usually advisable and its exercise destroys any right of action in respect of the nuisance ........ The defendants have violated every principle touching the abatement of nuisances. They gave no notice of their intended action. They have not proved that they did not do any unnecessary damage. They have not proved that there was not an alternative method to reduce the flooding of their lands."

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MORRIS *v.* HARRIS, (1927) A. C. 252.

*Company—Order of Court avoiding dissolution—Effect on acts done during interval—Companies (Consolidation) Act,* 1908, *S.* 223 (1).

S. 223, Sub-S. (1) of the Companies (Consolidation) Act, 1908 runs thus: "Where a company has been dissolved the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved".

*Held* by the majority of the House of Lords (Lord Shaw and Lord Wrenbury dissenting) that an order of the Court under the above section avoiding a dissolution do not affect the validity or the contrary of steps taken during the interval between the dissolution and its avoidance. They must still depend on the facts existing and the rights arising before and independently of that order.

*Per Lord Blanesburgh* :—"The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolu-

tion to have been void. Then, and only then, is the company restored to activity".

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MARTIN *v.* LOWRY. MARTIN *v.* INLAND REVENUE COMMISSIONERS, (1927) A C 312.

*Income-tax and Excess Profits Duty—Liability for—Carrying on trade—Single transaction on extensive scale whether amounts to—Meaning of expression 'annual profits or gains'—Income-tax Act,* 1918, *Schedule D.*

A merchant who was not usually engaged in the purchase or sale of linen purchased a large quantity of linen with the sole intention of selling it again at a profit, and he proceeded to sell it piecemeal by an extensive series of transactions spread over a period of seven months using for the purpose an organization and methods such as are ordinarily adopted by traders in selling the articles in which they deal. By means of the said transactions he made a huge profit and the question arose whether the same was assessable to income-tax and excess profits duty.

*Held,* by the House of Lords affirming a decision of the Court of Appeal that the assessee was carrying on a trade, that the profits came within the description of "annual profits or gains" in the first paragraph under Schedule D to the Income-tax Act, 1918 and that the same was chargeable to income-tax and excess profits duty. The words 'annual profits' do not necessarily imply recurrence, they simply mean the profits or gains accruing in the year in question. *Ryall* v. *Hoare,* (1923) 2 K B 447 approved.

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CORPORATION AGENCIES *v.* HOME BANK OF CANADA, (1927) A C 318.

*Banker and Customer—Company—By-laws—Director fraudulently drawing cheques on himself—Bankers not having notice of fraud—Liability to account as trustees—Company not sustaining loss—Effect—Device of 'kiting'.*

Where under the by-laws of a company the Director was authorised in conjunction with the Secretary-Treasurer to draw cheques on the company's banking account and the Director and Secretary-Treasurer signed a number of cheques in favour of the Director himself and it subsequently appeared that the cheques had been fraudulently drawn in order to assist the Director in his 'kiting' operations but at the same time it was shown

that moneys not belonging to the company were invested in the bank at the instance of the Director.

*Held,* in an action by the company against the bank to recover the money paid towards the cheques that the bank had not notice or knowledge of the fraudulent nature of the transactions and that consequently the bankers could not be made to account as trustees under the ruling in *John* v. *Dodwell & Co.,* (1918) A C 563. The decision was also supported on the ground that the company had sustained no loss; that neither the payments nor the drawings were authorised acts and the company could not repudiate the one and take the benefit of the other.

*Per Lord Wrenbury.*—"The device known in Canada as 'kiting' is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another and perhaps through many more. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid for which they are debited at the bank on which they are drawn."

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DOUGHTY *v.* COMMISSIONER OF TAXES, (1927) A C 327.

*Income-tax—Partnership converted into limited company—Transfer of business—Value of stock overestimated in company's balance-sheet—Increased value whether assessable to income-tax—Land and Income-tax Act,* 1916, *of New Zealand.*

Where two partners converted their partnership into a private limited company of which they were the only two shareholders and all the property of the business was consequently transferred to the company and the value of the stock was entered at a higher figure in the company's balance-sheet and the partner was assessed to income-tax on the increased value

*Held,* on the facts that there was no sale at all but a mere readjustment of the business position of the two partners and that the company's book-entry containing an overestimated value of the stock did not render it chargeable to income-tax; that assuming that the transaction was to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold and consequently there was no liability to income-tax.

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BRITISH AMERICA NICKEL CORPORATION, LTD. v. M. J. O'BRIEN, (1927) A C 369.

*Company—Deed of trust—Mortgage bonds—Resolution converting mortgage bonds into income-bonds—Purchase of vote—Validity of resolution—Scheme vesting control in Committee—Whether* ultra vires.

A company executed a mortgage deed of trust and raised money by issuing secured bonds. The trust deed provided power to a majority of the bond-holders consisting of not less than three-fourths in value to sanction a reconstruction of the company, to enter into a scheme for selling its assets and to sanction any modification of the rights of the bond-holders. A scheme for reconstruction was prepared on behalf of the company with the object of compelling the holders of mortgage bonds to exchange them for new income bonds and a committee was also constituted with full powers to modify the security of the mortgage-holders. The vote of one *B* was necessary in order to gain the required majority of bond-holders for passing the scheme and it was secured by a promise to him of a large sum of money.

*Held* that the resolution authorising the scheme was invalid because *B's* vote had been purchased ignoring the interests of the class of bond-holders and that the appointment of the committee was *ultra vires.*

*Per Viscount Haldane* :—"There is no difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity as being a member".

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THE CROWN v. MCNEIL, (1927) A C 380.

*Interest—Mining contract as between Crown and subject—Breach—Suit for balance of money—Interest whether can be awarded.*

The owners of certain mines delivered their ores to the West Australian Government for treatment and sale and on the terms that the balance of the sums realised by the sale of the products should be applied to discharge the sums due to the owners of the mines as sellers and there was great delay in mak-

ing payment of the sums to the owners on the agreed terms and they sued for the balance and for interest.

*Held* that as regards the ultimate balance it was held by the Crown in a fiduciary capacity and that liability for interest was one of the incidents of such a fiduciary capacity.

*Per Viscount Finlay* :—"If a person who has received money in a fiduciary capacity unduly delays making payment to his beneficiary, he is accountable in equity for interest upon the amount of the principal".

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THE VALESIA, (1927) P. 115.

*Shipping—Salvage—Contract for beaching ship—Non-performance—Negligence of shipowner—Damages.*

Where the owners of certain tugs agreed in return for a lump sum to assist a ship which had grounded on the rocks in getting it on to a sandy bay and the contract was not performed because of the negligence of the shipowner through his agents in not slipping the cable at the proper time.

*Held,* that the owners of tugs were not entitled to recover the sum they stipulated for but that they were entitled to claim damages for breach of the shipowner's obligations; also that judgment should only be given *in personam* against the shipowner.

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## JOTTINGS AND CUTTINGS.

*Identity and Finger Prints.*—An extraordinary problem of identity has recently arisen to baffle the Italian police in the case of *Bruniera, alias Canella* (*Times,* March 15). In 1917 Professor Canella of Milan, while serving with the Army in Macedonia, was reported missing and was never heard of again. In 1924 a man suffering from loss of memory was admitted into a Piedmont Asylum and there he remained for two years. Last year the wife and family of the Professor hearing that the asylum inmate bore remarkable external resemblance to their lost husband and father, visited the asylum, and unhesitatingly identified him as the professor. He was taken to Milan, where all the Professor's friends at once recognised him. By degrees he appeared to recover his memory, and then asserted that he was, indeed, the lost Professor, and purported to recall many incidents which had happened in the latter's career. All seemed well. Suddenly there fell a bolt from the

blue. A woman appeared on the scene and identified him as her husband, Bruniera, who had absconded three years before after a career of crime. The family and acquaintances of Bruniera one and all likewise identified him. He was examined and found to possess certain marks on the body which, however, curiously enough were alleged by both parties of relations to be life-long marks of Canella and Bruniera respectively. The Italian police have produced the finger prints of Bruniera which are alleged to be identical with those of the man whose identity is in dispute; but although this evidence is regarded as conclusive by the police, it is not considered equally satisfactory by the Professor's family, who cling to their identification! Is it not just possible that, where two men bear such striking external points of resemblance, their finger-prints—produced by the same vital forces which have produced their bodily resemblances—may also be so similar as to be indistinguishable? After all, the belief that no two persons can have identical finger-prints is merely a matter of theory, based on probabilities and experience; it is not a matter which can be scientifically demonstrated.

—*The Law Journal*, April 16, 1927, p. 383.

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*Judicial Obiter Dicta.*—Moved, no doubt, by a specific example, the *Drapers' Record* calls attention to "the pain and indignation caused by the irrelevant comments of some Judges, and particularly some of the County Judges" during the trial of cases which come before them. "It ought not to be necessary to remind a Judge of the impropriety of expressing opinions based upon *ex parte* statements, yet it is by no means uncommon for the Judge to utter more or less scathing remarks on the spur of the moment . . . . Parties coming before the Judge ought not to be regarded as targets for judicial humour or rudeness". Thus the *Drapers' Record*. It must be admitted that some Judges sometimes give occasion for such criticism. Witnesses, solicitors and counsel are made a butt for the rude jest and shrewd and often unwarranted rebuke; and it is every way desirable that such *obiter dicta* should be voluntarily suppressed.

—*The Law Journal*, April 16, 1927, p. 395.

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*The Improving Lawyer.*—It is accepted in every age as a fact that counsel and Judges are much better than their predecessors, more polite and more humane. So Sir A. Macdonald

observed to Dr. Johnson: "Barristers are not so abusive now as they were formerly"; he opined that they "had less law long ago and so were obliged to take to abuse to fill up the time". That was round about the time of Jeremy Bentham.

Yet, according to twentieth-century standards, there was still plenty of room for improvement. According to Blake Odgers, Q. C., in a lecture to Bar Students in 1900, judges in Bentham's days browbeat prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duties. Counsel bullied witnesses and perverted what they said. "The moral tone of the Bar is now wholly different from what it was when Bentham wrote; they no longer seek to obtain a temporary victory by unfair means . .....This is due partly to the improved education of the Bar; partly to the influence of an omnipresent Press; still more to Her Majesty's Judges. If Counsel for the prosecution presses the case too vehemently against the prisoner; if counsel in a civil case pries unnecessarily into the private concerns of the witness; a word, or even a look from the Judge will at once check such indiscretion. Remember the students of the four Inns....." Such was the state of pre-war excellence; and progress has, apparently, been maintained.

—*The Law Journal,* April 16, 1927, p. 395.

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*The Crown as Litigant.*—The Committee on Crown Proceedings were somewhat hampered in their endeavours by the intervention of Lord Haldane in 1924, who modified the original terms of reference and asked the Committee to prepare a Bill "on the assumption" that the suggested alterations of the law were in fact both desirable and feasible, and the Committee accordingly express no opinion on the merits of the proposals. The draft Bill, however, involves changes of great theoretical and some practical importance. Part I provides that litigation between Crown and subject in the High Court will be conducted in the same way as litigation between subjects; that actions by or against the Crown may be brought in the County Courts; while the Court may grant any relief to or against the Crown. Part II enables proceedings to be brought against the Crown for tort; and Part III *inter alia* provides that in all cases of litigation between Crown and subject the same rules as to costs shall apply as in ordinary litigation; while discovery to some extent may be obtained against the Crown.

So will pass, if and when a Bill embodying these provisions becomes law, the Petition of Right, Procedure by Information, and the theory that the King can do no wrong. Immunity from proceedings for tort has hitherto been shared by the King and the Trades Unions; but thereafter the Trade Union will, by virtue of 6 Ed. VII, Ch. 47, S. 4 (1), unless meanwhile something be done about it, continue to enjoy this Olympian freedom alone.

—*The Law Journal*, April 23, 1927, p. 415.

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*The Scottish Model.*—How far our theory in proceedings by and against the Crown lags behind that of the customs has been pointed out by Professor Morgan in his recent pamphlet on "Remedies Against the Crown"; but it was left for Lord Dunedin, writing to the *Times* from his holiday retreat at Bath, to point out that this trouble about Crown procedure was satisfactorily solved in Scotland nearly a century ago. "We never," says Lord Dunedin, "had occasion to have any such thing as a Petition of Right". Since the forties of last century the Lord Advocate represents the Crown for all purposes of defence. A "diligence"—the Scottish equivalent to discovery, is granted just as readily against the Crown as against a subject. If the Crown claims privilege for a particular document on grounds of public policy, the Judge himself would examine it; "for Judges, except when they wish to make jokes, can be trusted to keep their mouths shut."

It is certainly curious that Professor Morgan and others who ought to have known better overlooked the Scottish model. According to Lord Dunedin, the fundamental difference between the Common Law of England and that of Scotland is "that in England you have to find the remedy in order to discover the right, whereas in Scotland you have to find the right in order to discover the remedy."

—*The Law Journal*, April 23, 1927, p. 415.

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*Clearing the Court.*—The power of Judges to exclude the public from Court when it seems desirable so to do has often been debated. The rule appears to be that there is no right to hear the case "in camera" unless it has to do with lunatics or wards of Court, or is of the kind to which the old practice of the Ecclesiastical Court applies, or is one the object of which would be defeated by a public trial. It is clear that the public are

entitled to be present at all criminal trials, and the conventional direction that women and children shall leave the Court has, as regards the former, no legal sanction. Many Judges take pains to make this clear, and the ladies concerned not infrequently avail themselves of their rights.

—*The Law Journal*, April 23, 1927, p. 416.

## BOOK REVIEWS.

THE LAW OF INCOME-TAX IN INDIA, by Mr. V. S. Sundaram of the Indian Audit and Accounts Service, Secretary, Central Board of Revenue, Government of India. 1927. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 12.

We have already had more than one commentary on the Income-Tax Act from practising lawyers and, having regard to the nature of the subject, an exposition thereof by one who has been in close touch with it on the administrative side is certainly welcome. We may observe at the very outset that in the volume before us the treatment of what may be called the legal aspect of the subject is not any the less full or instructive because the author does not happen to be a lawyer by profession. The commentaries on the definition clauses and the principal 'charging' sections alone cover more than 400 pages, marked by a thorough and discriminating analysis of the case-law both in India and in England and freely interspersed with instructive references to the law in the Colonies and in the United States of America. This comparative treatment is indeed characteristic of the book and added to the historical information given in the Introduction and the Appendices, it greatly enhances the value and utility of the work. The elucidation of the points of difference between the law and practice in India and those obtaining elsewhere is clear and precise. We may, for instance, refer to the discussion at pages 147, etc., of the theory that the source of income must have existed during the year of assessment and at pages 225, etc., of the different connotations placed in different countries on the conception of the 'accrual' of income in a particular place or during a particular period. The author has not hesitated to criticise judicial pronouncements where he thought such criticism necessary or justified. Being intended not merely for use in Courts of law but also for the guidance of Income-tax Officers and a large section of the public, the book rightly deals at some length with

matters which in a Court of law may either be taken to be familiar or be regarded as beyond its province. The author was therefore also well advised in setting out the facts of all important decisions pretty fully and quoting freely and at length from all relevant judgments. Indian case-law on the subject is yet in the making and it is well that English precedents are fully understood before the authorities here decide whether and how far they are to be followed in this country. On points not covered by authority, the views expounded in the book may (notwithstanding the words of caution uttered in the Preface) be fairly taken as likely to be acceptable to the officers who have to work the Act and not unnaturally the author looks at certain matters more from the point of view of the department or the assessing officer than from that of the assessee. See, for instance, his observations at pages 258 to 260 as to the onus of proof in case of remittances from abroad and at pages 575, etc., with reference to the principles of evidence and procedure that should be followed by the Income-tax Authorities.

It is certainly convenient to have the text of the Act and the rules under it printed together in one place without having to search for them through the commentaries and the addition thereby caused to the bulk of the volume is not very much. Some of the material provisions of the English Income-tax Acts are set out here and there in appropriate places but we venture to think it may be more convenient to have them also brought together and printed as one of the Appendices. We have no doubt that the book will long remain the leading Indian Treatise on Income-tax Law.

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THE HANDBOOK OF INDIAN COMPANY LAW, by Solomon Judah, B.A., LL. B. Published by Messrs. Butterworth & Co., Ltd., Calcutta. Price Rs. 12.

This work is a commentary on the Indian Companies Act giving annotations thereon and notes explanatory of the practical operation of the company system. In this work the author has stated in a clear and concise form the principles of Indian Company Law under the various provisions of the Act and he has referred to the judicial decisions in England and this country. The lucidity of the commentary will make it useful not only to lawyers and students of law as a handbook on this important branch of law but also generally to businessmen. In some respects the Indian Companies Act of 1913 marks an

important departure in the history of Indian Company Law and contains several provisions as, for instance, in relation to the private limited company which in its present form was first brought into existence by this Act. With a view to illustrate the usefulness of the work we would refer to the various appendices to the work giving the Indian Companies Rules of 1914, the list of offences under the Act, the table of corresponding sections of the English Companies Act and the practical hints for the formation of a company limited by shares. We have no doubt that the book will be found useful not only to lawyers but to laymen connected with business.

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A MANUAL OF COMPANY LAW, by Pahlajsing B. Advani, M.A., LL.B. Price Rs. 3.

This book of less than 200 pages does not take the form of commentary of the Indian Companies Act under its various provisions. On the other hand, it is an attempt by the author to state the principles of the Company law as collected from the Act in their natural and logical sequence with references to the sections of the Act in the marginal notes. There is not always a natural or logical sequence in the provisions of the Indian Companies Act and many of the sections are long and involved with the marginal notes conveying an inadequate and not very illuminating idea of the entire contents of the sections. Under these conditions a book which merely sets out the principles of the law has to be welcomed One remarkable feature of the book may be drawn attention to here and that is the deliberate avoidance of the references to rulings, Indian or English, while their substance has been incorporated. It is well known that references to and quotations from rulings oftentimes perplex the student and more so the businessman. We have no doubt that the book will be found very useful to students and also to the promoters, managers and liquidators of companies for whom it is mainly intended.

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THE MOTOR VEHICLES ACT, by Nripendra Nath Dhar, B. L., Vakil, High Court, Calcutta. Published by M.C. Sarkar & Sons, Calcutta. Price Rs. 2-8-0.

Anybody attending the Police Courts or reading the daily newspapers must be impressed by the numerous accidents on the road owing to the motor vehicular traffic. The appearance of this work, which though primarily intended as a book of reference for Judges and lawyers has been so arranged as to meet the

requirements of the owners, drivers, manufacturers and dealers of motor vehicles, satisfies a greatly felt want. The Act itself with its 19 sections has been given with full commentaries under its provisions. The more important feature is the appendices giving the Motor Vehicles International Circulation Rules of 1915, the Motor Vehicles (Native States) Rules of 1916 and the Motor Vehicles Rules of the various Local Governments of Bengal, Madras, the United Provinces and Bombay. Perhaps the most interesting portion of the book is the bird's eye-view of the law of motor vehicles in India deduced from the Act and supported by the decisions found at the opening of the volume. This summary has been written with great clearness so as to be useful to the layman.

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THE LEGAL PRACTITIONERS ACT, Second Edition, 1927, by Kshitish Chandra Chakravarti, M. A., B. L., Advocate, High Court, Calcutta. Published by M. C. Sarkar & Sons, Calcutta. Price Rs. 3-8-0.

Since the publication of the first edition several important legislative changes on the subject have taken place which have to be noticed in any up to date book on the subject. Those changes have been noticed and fully discussed in the present work. The reported decisions have been brought up to date. We may perhaps notice that after the decision of the Privy Council in *Shankar Ganesh Dabir* v. *Secretary of State for India* (1) which has laid down that S. 13 (*f*) of the Legal Practitioners Act is not merely confined to acts done in a professional capacity by a legal practitioner, it is no longer open to argument that clause (*f*) of the section must be read *ejusdem generis* with the other clauses of the section. Although this decision is referred to under S. 12 of the Act, the learned author has not referred to it under S. 13 (*f*) on which it has a direct bearing and renders the discussion at page 60 of the book about the *ejusdem generis* rule and the references to older cases, more or less academic. The various appendices giving the rules in the various provinces relating to legal practitioners and their admission to practice in the courts greatly add to the usefulness of the book. Towards the end, the Bombay Pleaders Act of 1920 is given as an appendix. With such useful information, the book we hope will be found valuable to those having to deal with the subject.

1. (1922) I L R 49 C 845 : 44 M L J 32 (P C).

KHAN'S CIVIL AND CRIMINAL LAW SERIES. ARMS AND EXPLOSIVES, Vols I and II, Second Edition, 1927. Price Rs. 5.

This is an annotated edition of the Indian Arms Act, 1878 and the Indian Explosives Act of 1884 with the rules framed thereunder. The plan of the work is that under each section of the Act notes and comments including the case-law bearing thereon are set out. Then we find a note on legislation and, lastly, the rules and orders under each section commencing with those of the Government of India and dealing afterwards province by province. The author is entitled to the gratitude of the profession for having collected together all the various rules and orders scattered over different manuals in the several provinces which are often not easy to get. That the book has been practically re-written in this edition will be evident from the fact that the Arms Act portion which in the first edition covered only 80 pages now occupies no less than 350 pages of condensed matter. The appendices give valuable information upon all connected and kindred topics, such as provisions relating to licensed dealers, the provisions relating to Indian States and the army regulations and provisions relating to military men. Volume II deals with the Arms Rules of 1924 with the same arrangement as noticed above.

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THE INDIAN LAW OF HEARSAY EVIDENCE, by Syed Anees Yusoof of the Middle Temple, Bar-at-Law. Published by the Union Press, Meerut. Price Rs. 6.

The volume under review treats of a special branch of the Law of Evidence which has not been separately dealt with before, though the law bearing upon the same may be found in various places in any well-ordered text-book in the Law of Evidence. The most attractive and interesting portions are the opening chapters dealing with the historical development of the rule against hearsay, the objections to the hearsay evidence, the exposition of what is hearsay and a consideration of its various definitions, the meaning of the rule, its relaxation and exceptions. The principles being thus considered in the first two chapters, the author then deals with the subject under the various sections of the Evidence Act. We feel confident that this book treading, as it were, a new ground will be found interesting and instructive.

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TRIAL OF H. R. ARMSTRONG. Edited by Filson Young. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd., Calcutta. Price Rs. 6-8-0.

The volume under review deals with a very recent case of arsenic poisoning of a wife by her husband brought to light under strange circumstances nine or ten months after the death. The trial of the accused was sensational, as usual, and was the last of the murder cases tried by one of the greatest Cri. Judges of recent times, Mr. Justice Darling, as he then was. The importance of the trial may be gauged from the fact that the prosecution was conducted by the Attorney-General himself (Sir Ernest Pollock, now Lord Hanworth, M. R.) while the defence was in the hands of no less a lawyer than Sir Henry Curtis Bennet, K. C. The very mention of these names is sufficient for the reader to judge for himself what he can expect in the volume in the matter of examination of witnesses, addresses to the Jury and the summing up of the Judge.

It is not possible, within the space allotted for a review, to give even the bare details of the strange story that was unfolded at the trial day after day, culminating in the death of Mrs. Armstrong, how eminent doctors who attended on her during the many months of her illness never suspected arsenic poisoning and how suspicion of the true cause of her death was first raised by a subsequent attempted poisoning of a fellow-solicitor named Martin by the accused Armstrong. We must leave our readers to the pages of the volume itself. Very great interest will be felt by the lawyer in the question how far evidence was admissible in a trial for the murder of Mrs. Armstrong of the facts relating to the subsequent attempt to poison Martin. Mr. Justice Darling, without giving reasons, held the evidence admissible. Appendix A to the volume contains the full arguments on the question when the matter was taken up before the Court of Criminal Appeal and also the judgment of that tribunal holding the evidence admissible. Apart from the interest of the story, this by itself will amply repay a perusal of the volume and justify the observations of Mr. Justice Darling in his summing up that "the case is deeply interesting and one of very great importance to the public."

It is really unnecessary on our part at this point of time to refer to the well-known features of the Notable Trials Series which are maintained in this, the latest of the volumes issued by Messrs. Butterworth and Co.

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# LAW REPORTING*

## English Reports—(*Contd.*)

Criminal cases are found reported from very early times, for the matter of that, as early as the Year Books, but, as was to be expected from the rudimentary nature of the criminal law and procedure, the slender opportunities available for the defence of presenting their case either before the trial Court or before any other higher tribunal, and the amorphous nature of the rules of evidence, criminal cases do not figure as prominently in the early reports as civil cases and no modern digest, it will be found, gives references to pre-revolutionary period cases. To some of them I have already made reference. I have referred among others to the case of two lovers entering into a pact for suicide and one of them withdrawing and subsequently put up for murder. This is reported in Moore. A case in Anderson emphatically asserts that the reason for the arrest of a man should be clearly set forth so that he may test its validity before the superior Courts. For an illustration of the excessive technicality of the old criminal procedure of England, I referred to a case in Levinz where a coroner's inquest was quashed because the Latin word *Emerget* was inadvertently used for the word *Immergit.* A man was found as having feloniously thrown himself into the river and in the said river "*seipsum emergit*" and so killed and murdered himself. *Emergit* in Latin means "rose out of"—a man rising out of the river and so killing oneself was absurd. It was an obvious slip for *Immergit, i.e.,* plunged. But the Court was powerless to so

*The eleventh of a series of lectures arranged by the University of Madras delivered by Mr B. Sitarama Rao, Vakil, High Court.

treat it. In 4 Modern Reports, there is a case seriously discussing whether a sentence of death only without a further direction "that the entrails be taken out and burnt in his sight" did not render the sentence wholly illegal. *Regina* v. *Fooley,* a case reported in 12 Modern Reports 242, has full twelve pages of argument. But the first report dealing mainly with criminal cases is that by Sir John Kelying. He was a Chief Justice of the King's Bench. The Report though scrappy is considered of great authority. The Judge seems to have been in the habit of settling the points that might arise at the trials beforehand by private consultation with Crown Counsel. Seeing that at this period of time the accused had not the benefit of counsel, the points had largely to be settled by discussion between Crown Counsel and the Judge and it did not matter much whether they did it in Court or outside. The cases that he reports are of the years 1662 to 1669.

But the most valuable accounts that we have of trials are to be found in the volumes known as State Trials. They are not Reports of the ordinary kind. They aim at giving a complete account of the trial in all its stages —the examination of witnesses, the address of counsel, the interruptions of Judges, the discussions on points of evidence and otherwise, the summing up of the Judges, the verdict and the rest as far as possible *verbatim*. The cases reported are mostly of constitutional importance, but some trials of ordinary offences and good many trials for witchcraft and heresy are also reported. They are of the greatest importance as affording materials for the proper history of the Criminal Law of England in all the stages of its growth. The description that we gave above of the contents does not apply to the earlier volumes dealing with the times before the Tudors. The accounts of trials for the period are fragmentary, having been derived from monkish annals or other historical documents where no complete account of the *verbatim* kind could, in the very nature of things, be expected. The first edition of these State trials appeared in 1719 as an anonymous publication. The collection was made from various unconnected sources. Wherever the publishers had intimation that there was to be found any matter worth reporting, there they went, offering large amounts. Old libraries, solicitors' records, counsels' manuscripts, newspaper accounts and every possible avenue was laid under contribution and there is no doubt the whole thing is a

marvel of publishing enterprise. Nundcoomar's case is to be found reported *verbatim*. The first edition was in four volumes. From time to time further volumes containing additional matter were added and finally an edition of State Trials in 34 volumes known as Howell's State Trials appeared. Matter appearing disjunctively without any apparent order in the older editions was re-arranged in chronological order with considerable additional matter. The undertaking was so gigantic that it took 17 years to pass through the press. Sir John Copley (subsequently Lord Lyndhurst) is said to have recommended the reading of it to every lawyer. He used to say that he first learnt there how to cross-examine a witness. Another series of State Trials bring them up to 1858. The trials of the pre-revolution period are of little practical value to the ordinary lawyer as the rules of evidence had not yet developed and the mode of trial differed very considerably from what it is at present. During the Tudor period and for some time longer, the trials were largely excited altercations between counsel for prosecution and the accused, the counsel putting his questions or making his speech bit by bit and the accused denying it or arguing it out or calling upon the prosecution to place his accusers before him. Witnesses were rarely produced. Depositions, confessions, letters, etc., were produced but only if the accused demanded it and the Court thought fit to direct it, witnesses were examined. Torture was freely availed of for the purpose of ascertaining the truth At the end of the wrangle between the counsel and the accused the Judge summed up and the jury returned their verdict. We find there the monstrous sentences passed by Star Chamber Judges duly recorded. Belief in the miracles plays a large part in those early trials. The right of the accused to have the witnesses examined in his presence was clearly laid down only after the revolution but the practice seems to have been slowly growing. The trial of Suffolk witches by Hale in 1665 is to be found in those volumes; they do not reflect any credit upon the Judge whose reputation is otherwise very high.

Hale is the author of the history of the Pleas of the Crown which is a book of great authority and must have contributed a good deal to settle the law. He did not live to complete it and it was published after his death. It shows a depth of thought and comprehensiveness of design which puts it in quite a different category from Coke's third institute dealing with crimes.

He begins by investigating matters of excuse, infancy madness, misadventure, ignorance, compulsion and necessity and considers all the more important crimes successively which is the order adopted you will notice by the Indian Penal Code. His second volume deals with the whole subject of Criminal Procedure in capital cases. A great part of the book has become obsolete and a great deal of it is occupied with technical details and minute and hardly intelligible distinctions. The great merit of Hale is that he discusses principles in a manner not done before.

Another work of great authority is Hawkins' Pleas of the Crown. It is more or less like Bacon's Abridgment but exclusively confined to Pleas of the Crown. Unlike the modern Digests, it is not arranged alphabetically but deals with the subject under various headings like Indictments, Coroner, Attainder, Outlawry and so forth. The other well-known books of practice are East, Russel, Archbold and Roscoe which according to Sir James FitzJames Stephen repeat each other and abstract an immense number of reported cases adding practically nothing to the history and theory of the subject.

The next book we have to notice is Foster's Reports (1743-1761) with his discourses on treason. His writings have done much to settle that branch of the law. He wrote at a time when there was still room for improvement of the law by discussions, meant to show, not what had, as a fact, been decided in reported cases, but what it would be reasonable to decide on general grounds. Viewed in this light his discourses are admirable. They are perfectly clear, disencumbered of all unnecessary details and full of good sense and good feeling. The law as laid down by him has been more or less accepted since. But he is also responsible for some artificial doctrines connected with the law of murder such as that if a man shot at a tame fowl and accidentally killed a man, he is guilty of murder, but if he intended to shoot at a wild fowl and killed a man, he is guilty of manslaughter.

Another writer who has done much by his writing for Criminal Law is Blackstone. The chief merit of his work is that it presents a distinct and trustworthy picture of the Criminal Law of his time while yet the idea of recasting it had not made any progress and belief in the wisdom of its principles remained unshaken.

Leach's reports(1730-1815)is another report dealing exclusively with criminal cases. Russel and Ryan deal with the period 1799-1823. Lewin's Crown Cases (1822-1838) report cases on the Northern Circuit of the period. Lewin is said to be an inaccurate reporter and we have already referred to the amusing way in which some of his headnotes and indexes are prepared, but we find cases from Lewin referred to both in text-books and digests. Moody covers the period (1824-1844) and Denison (1844-1854). The second volume in Denison was reported by Pearce and so it is called sometimes Denison and Pearce's Reports. It reports judgments of Crown Cases reserved and other cases. Temple and Mew's Criminal Appeal Cases are in one volume and cover three years (1848-1851), an eloquent commentary on the paucity of criminal appeals in England. It was the beginning of appeals and people had not yet been familiar to the new practice. We have fairly large number of criminal appeals now. Dearsley (1852-1856), Dearsley and Bell (1856-1858),Bell (1858-1860) and Leigh and Cave (1861-1865) are the other reports that bring us up to the Judicature Act. In the Law Journal Reports there is a section dealing with the duties of Magistrates and the Magistrates' cases coming before the Superior Courts. Central Criminal Court Sessions papers deal with the cases of the Central Criminal Court in London from 1834 to 1912. Cox's Criminal Cases are a useful and oft-quoted series that began in 1843 and are still current. Ever since the institution of Law Reports up to the Judicature Act, L. R. Crown Cases reserved used to report cases coming before that Court; but since, the cases are reported in the King's Bench Reports. If perchance a case goes up to the House of Lords, it will be found reported there. Since the establishment of the Court of Appeal, we have a separate set of reports known as the Criminal Appeal Reports dealing with cases dealt with by that tribunal.

We have now come to the end of our survey of the English Law Reports from the earliest times and this, I think, is the fitting place to present a connected account of the evolution of the Law Reports in England.

Bracton's Note-book was compiled from the Court-records and though in a sense, is the earliest attempt to give precedents in a connected form, cannot be considered a Law Report in the proper sense of the term. The earliest instance of a Law Report is the Year Book. The Year Books cover the period 1292-

1537, but even here the Year Book from 1292-1328 cannot be properly regarded as a report as it contains only extracts from the rolls. Reporting proper begins from the time of Henry III. But even when it becomes a report, it varies very considerably from the modern conception of a report. It more resembles a newspaper report. It is an exact transcript of what takes place in Court with what is relevant and irrelevant, the arguments of Counsel, the observations of the Judge and the reflections of the reporter. There is no attempt to present a whole case from the commencement to the end. Being at the start, only student's note-books, the report begins and breaks off according as the student happens to be present or to be away. Names of parties and the dates are not given. The report is generally a discussion as regards the pleadings, the form of action and the venue—matters of importance at that time. These discussions are far from being orderly and are a mere jumble presenting the greatest difficulties to the reader to disentangle the Judge's observations from the Counsel's and the reporter's. The Books of Assizes and Longo Quinto though presenting in the main the same features, are more regular, and approximate more and more to the modern conception of the Law Report. In the beginning, matter is not arranged in the chronological order. It is only after some time that the report is arranged according to years, the feature from which these reports derive their name. In the Year Books we have clear indications of the various theories as to reporting whether the report should contain the pleadings, the discussion and the judgment or whether these should be presented separately, whether the matter should be arranged chronologically or according to subject-matter, whether the report alone should be given or whether superadded, should appear the pleadings, the note and institutional instruction. The experiments resulted finally in favour of the chronological and complete reporting, omitting the picturesque elements. The reports for a long time used to have the characteristic of lawyer's note-books containing cases copied from other's note-books and decided long before the time of the reporter in addition to cases noted down by the writer and sometimes also further accumulations till the time of the publication which so often took place long time after the death of the reporter. The first publication to be called reports are Dyer's Reports, the name till then given to them being Annals, Commentaries and Cases. Though called

reports they are not full and are merely notes of cases made by a busy man for his own use. It must have been also noticed by you that most of the early reports were reports of cases either argued by the reporter or decided by him. The first regular reports, in fact one of the best are those of Plowden. They contain all the essentials of a good report. The headnotes, the pleadings, the arguments and the judgments with the reasons are all given intelligently and with sufficient fulness. They were published during the lifetime of the reporter unlike most other reports of the time. From the point of view of a perfect law report, Coke's Reports can hardly take a high place. No doubt he gives a statement of facts, the substance of what was said on both sides and the resolutions of the Courts. But as all arguments are confessedly presented in his own singular manner, the result is utter confusion and one is unable to see what is Coke's own inference and what the Judge's decision. Coke himself being a great authority, that circumstance does not detract from the value of the report as authority. In fact, with most of the reports of those times, the imperfect reporting is made up in professional estimation by the authority of the reporter. As we noticed before, even in Bacon's time, reports were considered to have grown enormously and various suggestions were made by him for their improvement and simplification. He was for a revised edition of the reports omitting whatever was a mere reiteration of well-known principles, or had been overruled or had grown useless. He was also for an official Digest. His other suggestion was official reporting, but that, as we have seen, was not particularly a success and the experiment was not repeated. A more interesting suggestion is that of Lord Campbell, an *auto de fe* every 10 years—an inquisition in fact every 10 years consigning every useless case to destruction. The circumstance that some of the reporters reported only their own cases, has led to their arguments being given at inordinate length, a propensity which cannot be said to have altogether disappeared even this day in reporters. The fact that reporters have not the choice of reporting only their own cases has kept the evil in reasonable check. The first specialisation appears when Chancery cases came to be separately reported. Carey was the first regular reporter in Chancery. There were a few reports exclusively of Crown cases, or Practice cases or even of Exchequer cases fairly early but they are not many nor was there regular reporting of each Court separately till we come to comparatively recent times.

The very nature of these reports is such that they are of varying degrees of fulness and authority but have the virtue of acting as mutual correctives and supplements giving as a net result a fairly adequate report of the case, but the process of piecing together necessarily involved considerable labour. The haphazard reporting reached its acme in Keble who printed his notes as he took them in Court, the report of the same case appearing in a dozen or more places according as the case progressed. Of the Restoration period reports, Saunders is the best. In the hands of Saunders, reporting became a fine art and the skill with which he presents facts, arguments and the conclusions is very remarkable. But even his reports labour under this defect that you do not have the judgment of the Court in sufficient fulness. Though the reports were from manuscripts of great lawyers their publication sometimes was the result of commercial venture and oftentimes without sufficient guarantee as to their accuracy. Reporting itself as a commercial venture began with the Modern Reports. Lawyers were employed by some publisher and in some of the volumes the cases are reported in a conversational form noting the interruptions and other exact words of the Court. Though there have been some good reporters like Plowden, Saunders, Pere Williams and others, Burrow's Reports, as we said before, really marked an epoch in reporting. He does reporting with great care giving a full statement of facts, pleadings, arguments and judgments. Though it is still the substance of the judgment that is given, the report is full. The method of Burrow was adopted by East, Maule and Selwyn, Barnewal and Alderson and others. From Burrow's time reports are published by the author himself, but term reporting began only with Durnford and East. Ever since, reporting has been term by term if not earlier as in the case of Weekly Reporter, Law Journal, Law Times, and finally the Law Reports which are published monthly. From the time of George III. we have reporters confined exclusively to each Court, which naturally has led to fuller and larger reporting than was possible under the old haphazard system of reporting. Specialisation as to reporting has gone on not only according to Courts but also according to subject-matter. The first has led to separate reports as to House of Lords, Privy Council, the Court of Appeal in Chancery, the Rolls Court, Vice-Chancellor's Courts, King's Bench, Common Pleas, Exchequer Court, Probate and Divorce, Admiralty and Ecclesiastical Courts, Election Courts, and so

forth. According to subject-matter, you have Crown cases, Bail Court, *Nisi Prius* cases, Criminal cases, Insolvency, Exchequer, Equity, Mercantile cases, Patent cases, etc. The genesis of the so-called authorised reports we have already traced and how though it did confer certain special privileges on the reporter it did not afford any guarantee either as to the punctuality of the report or its accuracy, on the other hand how it made for great costliness and dilatoriness. Some of them were inferior to their less favoured rivals. The necessity for maintaining the size sometimes led them to print a lot of useless matter. The latest experiment is the present system of reporting under the authority of the Council of Law Reporting. The Council is not an official body and has neither special privileges nor any monopoly of reporting. Originally it started with three Editors. Now it has only one Editor with several reporters. The appointment of reporters, as is wont in England, goes on lines settled by custom and vested interests. The House of Lords, for instance, appoints its own reporters. The practice is to submit the judgments to the Judges concerned after making such verbal corrections as may appear essential and to report them with such further modifications as they might suggest. If any doubt arises the counsel engaged also are consulted; in fact every attempt is made to maintain accuracy. There is no rule as to what cases are to be reported, either that all written judgments should be reported or that only cases involving questions of law should be reported. According to Sir Frederick Pollock, who was the Editor till recently, utility to the profession is the only test that was adopted by him. The object of the Council is to place authentic reports of all the valuable decisions of the English Courts at the disposal of the profession at the actual cost incurred in bringing them out. Whereas under the old regime one had to pay £30 to secure a set of authorised reports, under the present regime it could be had at £4-4*s.* which owing to war conditions, had to be raised to £6-6-0 but has since been reduced to £5-5-0. Though it cannot be denied that the English Reports maintain a high degree of finish, still complaints are not wanting. It had been fondly hoped that in the face of efficient reporting at nominal cost, unofficial publications would disappear but as a matter of fact they have not disappeared nor do they show any prospect of disappearing. Before we consider the rules that are observed or should be observed in reporting, we may take a glance over the system of reporting adopted in different countries in Europe and America.

In France, every decision is required to be in writing and to disclose on the face of it the grounds and the reasons on which it is founded. And when the signature of the Prefect is affixed, it is the duty of another officer to see them entered in the register. The register is open for inspection to the public and it is open to any one to make a selection of such decisions for publication. But they are not official publications.

In Italy, all judicial decisions are to be read aloud in Court and authentic minutes of judicial opinion should be recorded in the register of the Court. Compilations of the decisions of four principal Courts are published by non-official editors who make proper selection of cases with head-notes, marginal notes and annotations. There is so much protection as is involved in the purchase of certain number of copies of La Legge Roman —a journal of judicial and administrative proceedings containing in an abridged form notes taken from the register of important decisions.

In Denmark, it is competent for any one to take down, print and publish reports of which he has himself taken notes. The only authentic version is that in the records of the Court where the judgments with the reasons of the Judges are entered under the hand of the Judge. Selections are made by direction of Courts and may also be made by competent private publishers.

In Norway and Sweden, judgment is always to be in writing and in every case ought to be entered on the protocols of the Courts. In the Supreme Court of Appeal, votes are given separately and the Registrar is to record the final judgment or conclusion without grounds or reasons. Records supply authentic record and the publication is open to free trade.

In the United States of America, judgments are generally in writing. In most of the States and in the Supreme Court there are Official Reporters who are remunerated by salary as well as a portion of the profits. Reporters are generally appointed by State, but there is the same freedom in reporting as in England, and there is considerable private reporting as official publications rarely appear soon after the judgment. In the official publications, no arguments of counsel are given. In the State of New York reports are priced under statute. As I have said before the publication of Law Reports is a speciality in England and the countries that follow its rule as to precedents and countries that follow the other system naturally have not quite the same kind of reporting.

The committee appointed by the Bar for the consideration of ways and means for proper reporting did not recommend monopoly of citation though we find Lord Lindley was in favour of it. The utter futility of such a provision has been demonstrated in India.

According to Lord Lindley the defects that are to be avoided by reporters are (1) Reporting cases which are valueless as precedent, (2) Long Reports of complicated facts not necessary to understand the legal principle involved, and (3) Long head-notes giving the facts of the case and the conclusion couched in this fashion—Where so and so did so and so, etc., etc., held in the circumstances plaintiff had no cause of action. His view is that only legal pith of the case and nothing more should appear in the head-note. The reporter should report according to the same high authority only cases which introduce or appear to introduce a new principle or a new rule or modify an existing principle or which settle a doubtful question or it must be a peculiarly instructive case with the rider that on the whole it is better to err on the side of too much reporting than too little. He is against the reporting of cases on the construction of documents unless they are on the construction of common forms or introduce a new principle of construction. Interpretation of Acts of Parliament or rules of Court, and cases on unsettled points of practice are also fit subjects for reporting. In England, the practice cases are reported in the Weekly Notes. He is for the reporting of only so much of facts and arguments as are necessary for the elucidation of the principle of law arising in the case. Speedy reporting and good index are the other essentials of good reporting. He is against reporting a judgment simply because it is a written judgment or omitting one delivered offhand for if such judgments had been omitted, most of the famous judgments of Jessel would have gone unreported. One has only to state it to realise the incalculable loss law would have sustained by such a course. The practice uniformly followed by the Editor of the Law Reports in England is to hold back a judgment which is under appeal. In the Law Reports you never find a case without the arguments fully exhibited. The usual practice of inefficient reporting all over the world, viz., to state that the facts and arguments appear in the judgment is never adopted. The facts are extracted from the judgment and separately printed at the commencement of the report.

The causes of over-reporting and inefficient reporting in England are analysed and shown to be the following by a competent observer. First, there is a general desire not to be outbid by the other journals. Secondly, there is a tendency in the Bar to over-estimate the importance of early reporting and larger reporting however inefficient it might be. Another thing that operates is the desire to make the journal self-sufficient. If the fact that a case is reported in some other journal should be regarded a reason for not publishing it in yours, your subscriber will have to subscribe for a number of journals to be equipped with all cases. The interest of the reporters to see their own cases reported contributes its due share to over-reporting. The desire of the counsel appearing to see themselves in print also contributes its share. Nor is the vanity confined to reporters and counsel. The Judges also are sometimes bitten by this ambition and the reporters cannot help pandering to it. However much the talk of the value of old and unquestioned cases, there is a constant demand by the Bench for the latest case and the reporter who lags behind in this respect cannot expect encouragement either from the Bar or the Bench. Laziness of the reporter also has not a little to do with indiscriminate reporting. Sound discretion is to be exercised in rejecting a case, none need be for admitting one. And then there are considerations of bulk which have to be borne in mind by the reporters. They have to bring out a certain number of pages and the pages have got to be filled up somehow or other. The only way of counteracting these vicious tendencies is by educating the profession and no less the Bench on the utter folly of these courses. Multiplicity of report, without any difference in substance, is the bane of the profession. It is not, however, by conferring monopoly that the end in view can be achieved but by encouraging efficient and prompt reporting. If these criticisms are called forth by the conditions in England, how much more in this country where there seems to be a feeling that however well-settled a principle, there is some suspicion attaching to it unless it is periodically affirmed. It is on this principle that most of the reports in India are acting. A case may do no more than follow a Privy Council judgment and yet it is reported as if the ruling of the Privy Council is to be buttressed by the approval extended to it by a single Judge of an obscure Court in a corner of India. Arguments are rarely given—facts much less. The reader is left to his own devices to find out the facts as best he can and he is always met by the

sapient remark that the facts are to be found in the judgment. The head-noting is also very defective. Hardly any head-note brings out all the points decided in a case and the defect of the head-note goes to the Digest and the lawyer who depends on the Digest for his law is after a veritable will-o'-the-wisp. The semble, the quære and even the *obiter* of the Privy Council is of much greater importance than the judgments of many a single Judge. This aspect of the case is always forgotten by the reporter in India. The only way in which improvement in this direction can be attained is by educating the legal profession to a proper conception as to the essentials of . good reporting and the need for it. Just as you won't have an inferior article though it is cheap, if the legal profession is educated into a frame of mind which would reject bad reports, we may be able to see the end of the present confusion and waste of life.

Abridgments are the precursors of the Digest and have been in vogue from very early times. There is a constant reference in the Year Books themselves to abridgments. One of the Year Books, that of the reign of Richard II, seems to be an abridgment from a regular Year Book. An abridgment or a common-place book was considered essential to every student. Sir Mathew Hale points this out in his preface to Rolle's abridgment. The earliest abridgment proper that we have is that of Statham published in 1490. In 1509 or so, an abridgment of the Book of Assizes by Pignon was published; in 1514, FitzHerbert's abridgment, in 1568 Brooke's. These are Digests of case-law like Mew's or Chitty's. They adopt the alphabetical order which was later on in the 17th century adopted by the Legal Encyclopædias. Rolls' abridgment is the first of the new type suggested by Bacon. It was prepared by him for his own use. It was published after his death by Sir Mathew Hale with a preface giving a historical summary of the development of Common Law up to the time of restoration. The main topics are arranged in the alphabetical order but each topic is divided into sub-heads in the logical order. Hughes published his abridgment in 1660-1662 and Nelson 1725-1762. D'Anvers proceeded up to Error in 1737. His work was taken up by Viner who began with F. His abridgment was published between 1741 and 1756. He had the imprimatur of the Judges for his undertaking. There are two other Digests which are famous and have the same authority as text-books—Comyn's Digest translated from French published in

1762 and Bacon's abridgment which Maine calls "our classical English Digest". Between 1841 and 1844 there appeared two editions of Petersdorff's abridgment. The Current Digest going under the name of Mews was started by Chitty and continued by Fisher.

The lawyers' note-books which on publication became elevated to the dignity of reports naturally contained marginal notes, references and reflections of the lawyer responsible for them and some of them appear in the published editions of the Reports. This suggested the idea of publishing annotated editions of the reports. One such is Williams' edition of the Saunder's Reports which is more or less a text-book in the guise of notes on cases. The notes digest the entire known case-law of the time on the topic of pleadings and have won for themselves a place as an authority. Similarly, the notes of Cox add value to Pere Williams' Reports. They apparently inspired Smith to publish his leading cases. White and Tudor have their leading cases in Equity. Other ventures of the kind are Cobbet's Leading Cases, Finche's Leading Cases, Bigelow's Leading Cases, etc.

The Law Reports supply the same place in the building up of the English Jurisprudence as the great text-books of Papinian, Ulpian and Savigny in the Civil Law. While the great Doctors of Civil Law published and improved their texts, the ambition of the English Jurists was to leave lasting monuments of their legal culture and juristic thought in the judgments enshrined in the Law Reports. It is the considered opinion of Bryce that Judges like Hardwicke, Mansfield, Stowell, Jessel, Cairns and Bowen are worthy to be ranked with aforementioned great jurists by reason of their contributions to the legal literature of the world.

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## RELATION OF OATH OR AFFIRMATION TO THE OFFENCE UNDER S. 193, I. P. C.

BY DR. S. SWAMINATHAN.

According to Sir Edward Coke (3 Inst. 164) the offence of perjury can be committed only when a lawful oath is administered in some judicial proceeding and an oath is said to be a religious asseveration by which a person renounces the mercy

and imprecates the vengeance of Heaven if he does not speak the truth. Bentham says: "By the term 'oath', taken in its largest sense, is universally understood a ceremony composed of words and gestures, by which the Almighty is engaged eventually to inflict on the taker of the oath, or swearer, as he is called, punishment in quantity and quality, liquidated, or more commonly unliquidated, in the event of his doing something which he, the swearer, at the same time and thereby engages not to do or omitting to do something which he in like manner engages to do. Correlative to the term 'oath' is the term *perjury* and it conjugates to perjure oneself, perjured, perjurious; among which perjury is understood as designation of the conduct, whether positive or negative, which stands in opposition to the conduct engaged for, as above."

In England, according to Blackstone, the offence was anciently punished with death and afterwards by banishment or cutting out the tongue. Then it became forfeiture of goods. Under a Statute of Elizabeth the perjurer was liable to the penalty of perpetual infamy and a fine and in default of payment it was imprisonment and he was to stand with both ears nailed to the pillory. By comparatively modern statutes the expression 'oath' includes also affirmation and declaration.

The Muhammadan Law relating to *Yameen Ghamoos* was even stricter than the mediæval notions current in Europe as to the sanctity of an oath or a *jus jurandum*. The Doctors of Islam argued that an *yameen ghamoos* being a calling God to witness to a falsehood, is a crime of great magnitude and there is no expiation for such a deadly sin, being a disrespect shown by the swearer to the name of God of his own free option. The Prophet has declared *"whosoever sweareth falsely the same shall God condemn to hell"*. A valid oath may be taken by the swearer affirming "if I say anything contrary to truth, may I be deprived of the Prophet and of the Koran".

The East India Company when it was called upon to assume the functions of the Sovereign power found regularly established courts of law dispensing justice after trial according to the rules of the Muhammadan Law of Evidence. A Hindu in order to qualify to bear testimony took an oath in the mamool form with a *Thulasi leaf* and Ganges water in the hollow of his right hand palm. A Muslim took his oath by the Koran. The earlier regulations took the close parallelism between the oath insisted upon by the Courts in India as a

matter of universal principle and took it for granted that the maxim *"In judicio non creditur nisi juratis"* as a principle of universal application. The preamble to India Act (V of 1840) is in these terms:—

"Whereas obstruction to justice, and other inconveniences have arisen in consequence of persons of the Hindu or Mahomedan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms which are repugnant to their consciences or feelings:

"It is hereby enacted, that except as hereinafter provided, instead of any oath or declaration now authorised or required by law, every individual of the classes aforesaid within the territories of the East India Company shall make an affirmation to the following effect:—

"I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth and nothing but the truth".

The Indian Penal Code advisedly refrained from using the term 'perjury' and what is punishable under S. 193, Indian Penal Code, is *the intentional giving of false evidence* though S. 191, which defines *"giving false evidence"* introduces, "being *bound by an oath*" as one of the alternative elements constituting the offence. But where the law imposes an obligation upon a person to speak *truly* in particular circumstances, an intentional speaking of an untruth would equally constitute the giving of false evidence even though the speaker was not under oath. Thus S. 175 of the Code of Criminal Procedure empowers a police officer holding an inquest to examine witnesses and requires persons summoned by the police officer to attend and to answer *truly* all questions subject to certain exceptions not material here. An inquest witness intentionally stating an untruth would render himself liable under S. 193 having regard to the Explanation 2 to that section.

Leaving aside for the present the class of cases where an express provision of law requires a person to state the truth, the question arises whether an oath or affirmation is essential to constitute the offence under S. 193. The real fact is, the cumbersome ceremony of taking an oath or making an affirmation like numerous other ceremonies in this country has entirely outgrown its usefulness. Mahmood, J., in 1888, thus expressed his personal views in *Queen-Empress* v. *Maru* (1).

"My own past experience both as a member of the Bar and as a Judge of the Courts of first instance warrants my saying that in the vast majority of cases the solemn affirmation introduced by Act V of 1840 in

1. (1888) I L R 10 A 207 at 214.

lieu of the older form of oath is not treated or felt by native witnesses as binding upon their conscience. And in view of this circumstance it is a question of great importance how far our law of perjury in the apportionment of punishment should be applied to cases in which a native witness, to whom no such oath as is binding upon his conscience has been administered, has not spoken the truth after the solemn affirmation provided by the law, and which affirmation he feels not binding upon his conscience. I am aware of the reasons which induced a philosophical jurist of the eminence of Jeremy Bentham to object to the whole theory of administering oaths"

It cannot be denied that in spite of the oath or affirmation there is a very large amount of false evidence given before the Courts in this country just as there was in England an immense amount of perjury when that offence was punishable with death more especially among the jurors who had to try the perjurers. The statute law in India has long ago recognised this fact when it enacted S. 13 of the Indian Oaths Act (X of 1873) in these terms:—

S. 13—"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

The word *omission* in this section has been authoritatively interpreted by the High Courts to include intentional omission and not to be limited to accidental or negligent omission. *Queen* v. *Sewa Bhogta* (2) and *Re China Venkadu* (3). If a Judge conducting a judicial proceeding may advisedly refrain from administering an oath or affirmation to a witness without in any way affecting either the admissibility of the deposition as legal evidence in the case or the obligation of the witness to state the truth, it is as good as the opening words of S. 191 regarding a *person bound by an oath to speak the truth* having been repealed. In fact this was exactly what was decided by a Division Bench of the Calcutta High Court in *Gobind Chandra Seal* v. *Queen-Empress* (4) where Norris and Beverley, JJ., held that the law was clear that the offence of giving false evidence may be committed although the person giving evidence has been neither sworn nor affirmed.

The process of administering oath or affirmation consumes an appreciable fraction of the Court's time and at present serves only the purpose of making the average country witness,

2. (1874) 14 Beng. L R 294 (F B). 3. (1913) I L R 38 M 550.
4. (1892) I L R 19 C 355.

unaccustomed to the atmosphere of a law court, thoroughly confused without in any way adding to the dignity or the solemnity of the judicial proceedings. It is high time that some future Repealing and Amending Act should take note of the existing statute law as interpreted by the Full Bench in *Queen* v. *Sewa Bhogta* (2) and by the Division Bench in *Gobind Chandra Seal* v. *Queen-Empress* (4) and make consequential amendments not only in S. 191, Indian Penal Code, but also in several cognate sections of the Penal Code, the Code of Criminal Procedure and in other enactments and do away with the entire useless and antiquated ceremony of swearing in of witnesses before their evidence is recorded.

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## SUMMARY OF ENGLISH CASES.

*In re* QUINTIN DICK : CLONCURRY (LORD) *v.* FENTON, 96 L J Ch. 9.

*Will—Names and Arms Clause—Forfeiture for non-compliance—Expression "refuse or neglect" as denoting exercise of will—Heir-at-law being ignorant of rights under will—Effect.*

The testator directed that his estate should be held by his trustees to the use of his sister during her life and after her death to various other persons and their male issue. The will contained a names and arms clause in the following words:—"Every person who shall be entitled to the possession and enjoyment of the said estate after my sister shall and do within three months after he shall become entitled to the same.... take upon him and use in all writings the surname of Dick only and use the arms of Dick only and I do hereby direct that in case any person so entitled shall refuse or neglect to take my said surname and arms his interest in the estate shall cease and the same shall devolve to the next beneficially entitled". The sister died in 1864 and the last of her issue died in December, 1923. The trustees took out summons in April, 1924 to determine if there was any heir-at-law and it was eventually found out that one *B* living in Canada was entitled to take the estate. It appeared that the said *B* had all along been ignorant of his rights. The question arose whether there was a forfeiture of *B's* interests because of the names and arms clause.

*Held,* that *B* did not *refuse or neglect* to take the name and arms and that consequently had not forfeited his interest in the

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2. (1874) 14 Beng. L R 294 (F B). 4. (1892) I L R 19 C 355.

estate. The expression 'refuse or neglect' does not cover every class of omission; it merely applies to a case where the person has present to his mind the question whether he will or will not comply with the condition.

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PARKER AND COOPER, LIM. *v.* READING AND JAMES, 96 L J Ch. 23.

*Company—Transaction* intra vires *and beneficial to company—Assent by corporators at different times separately—Validity.*

*Held,* that where the transaction is *intra vires* and honest and especially if it is for the benefit of the company it cannot be upset if the assent of all the corporators is given to it. It does not matter in the least if that assent is given at different times all the corporators discussing and agreeing to it one with another separately.

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*In re* A DEBTOR, 96 L. J. Ch. 28 (C. A.).

*Married woman—Actress engaged for producing scenes—Actress receiving fixed payment and paying others for production of scenes—Whether "carrying on a trade or business" within the meaning of S.* 125 (1) *of the Bankruptcy Act,* 1914—*Meaning of the words "trade" and "business".*

S. 125 (1) of the Bankruptcy Act, 1914 provides that "Every married woman who carries on a trade or business.... shall be subject to the bankruptcy laws as if she were a *feme sole".* A married woman who was till then an actress was engaged in giving performances on the stage involving the incurring of liabilities and was paid a fixed sum and after paying what was necessary for the production of the scenes she retained the balance as her profits.

*Held,* that under those circumstances she must be deemed to "carry on a business" within the meaning of the section.

*Per Scrutton, L. J.* :—"The words 'trade' and 'business' do not mean the same thing........ The word 'trade' is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with any general definition. 'Business' is a much wider term than trade. The word 'business' at least covers a continuous occupation involving liabilities to others."

MANLEY *v.* SARTORI, 96 L. J. Ch. 65.

*Partnership—Death of partner—Rights over entire assets —Surviving partners carrying on business with partnership assets—Right of executors of deceased partner to share in profits—Presumption as to business being carried on with partnership assets.*

*Per Romer, J.* :—"The rights of a deceased partner or his legal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance sheet of the partnership as drawn up at the date of his death. Where in such a case the surviving partners instead of realising the assets and distributing the proceeds among the parties in accordance with their rights and interests, choose to carry on the business and make profits by virtue of the employment of any of the partnership assets, then, subject no doubt to making a proper allowance to the surviving partners for their trouble in so carrying on the business, such profits belong to all the persons interested in the partnership assets by means of which the profits have been earned in accordance with their rights and interests in those assets .... Where the surviving partners continue to carry on the partnership business *prima facie* they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are *prima facie* entitled to a share of the profits proportionate to his share in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilisation of the partnership assets".

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HARMS (INCORPORATED) *v.* EMBASSY CLUB, LTD., (1927) 1 Ch. 526 : 96 L J Ch. 84 (C. A.).

*Copyright—"Sole right to produce work..... in public"—Performance in proprietary club attended by members and guests—Infringement—Tests for deciding whether there has been performance "in public"—Copyright Act,* 1911, *S.* 2.

"Copyright" is defined by S. 2 of the Copyright Act, 1911, "to mean the sole right to produce or reproduce the work..... in public". Where a proprietary club had a paid orchestra and a performance therein was attended by a large number of

persons some of whom were members and others guests, and it appeared that the author had been materially prejudiced by such performance

*Held* by the Court of Appeal affirming a judgment of Eve, J., in (1926) Ch. 870 that there was a performance "in public" so as to constitute an infringement of copyright.

*Per Lord Hanworth, M. R.* :—"In considering whether there has been a performance "in public" the following tests may be applied:—"First, whether there has been any injury to the author, and here profits is a very important element. Next, whether there has been the admission of any portion of the public with or without payment. Then one has to consider whether or not the performance is a domestic one..... a matter of family and household concern only. Then again it requires consideration where the performance took place".

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WHYTE, RIDSDALE AND CO. *v.* ATTORNEY-GENERAL, (1927) 1 Ch. 548.

*Interpretation of Statutes—Act containing general prohibition against import of goods containing synthetic organic dyestuffs—Protection of dyemaking industry as object—Importation of artists' colours containing small quantity of synthetic organic dyestuff if prohibited—Dyestuffs (Import Regulation) Act,* 1920, *S.* 1, *Sub-sec.* (1).

S. 1, Sub-sec. (1) of the Dyestuffs (Import Regulation) Act of 1920 provides that with a view to the safeguarding of dyemaking industry the importation into the United Kingdom of all synthetic organic dyestuffs, ...... shall be prohibited. The question arose whether certain artists' colours and materials containing a small quantity of synthetic organic materials could be imported. It was contended that the importation of such products would not have the effect of prejudicially affecting the dyemaking industry and that consequently they could be imported.

*Held,* that the Act contained a general prohibition of any importation of synthetic organic stuffs and that the colouring materials sought to be imported fell within the said prohibition.

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*In re* WAIT, (1927) 1 Ch. 606 : 96 L. J. Ch. 179 (C. A.).

*Sale of goods—Contract for sale of unascertained goods—Bankruptcy of vendor after payment of price and before deli-*

*very—Buyers whether entitled to claim specific performance or equitable assignment of goods sold—Sale of Goods Act,* 1893, *S.* 52.

On November 20, 1925 *W* entered into a contract for the purchase of 1000 tons of western white wheat imported into England from the United States of America by the vessel *Challenger.* On November 21, 1925 *W* agreed with certain persons to sell 500 tons of wheat per *Challenger.* On January 4, 1926 the Bills of Lading arrived and were signed by the consignee and immediately thereafter *W* rendered his sub-purchasers a provisional invoice and received cash for the value of the goods. On February 24, 1926 a receiving order was made and *W* was adjudicated insolvent on March 5. Meanwhile, the *Challenger* had arrived on February 28. On an application by the sub-purchasers it was contended that the trustee in bankruptcy should specifically perform the contract of November 21, 1925 or in the alternative that there should be repayment of the money advanced to *W.*

*Held,* by the majority of the Court of Appeal (Sargant, L. J. dissenting) reversing a judgment of the Divisional Court in (1926) Ch. 962 that the goods contracted to be sold were neither "specific" nor "ascertained" within the meaning of S. 52 of the Sale of Goods Act and that consequently the remedy of the sub-purchasers was to obtain damages and not specific performance. Nor could it be said that at any time there was an equitable assignment which ever gave the sub-purchasers a beneficial interest in the goods.

*Per Sargant, L. J.* :—"There had prior to the bankruptcy been created in favour of the sub-purchasers equitable rights of the nature of equitable assignment or equitable lien in respect of the wheat, which were enforceable against the bankrupt and which prevented the wheat vesting in the trustee otherwise than subject to those equitable rights."

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*In re* MADAME TASSAND & SONS, LIMITED, (1927) 1 Ch. 657.

*Company—Rights of preference and ordinary share-holders —Articles providing for equal division of profits—Division of surplus assets as profits.*

A company was incorporated in 1889 with a capital of £200,000 in £1 shares and by the memorandum it was provided

that the original shares and also any increase of capital might be guaranteed or deferred shares. 75,000 of the original shares were issued and fully paid up. In 1902 the company resolved that 50,000 of the unissued shares should be issued as preference shares entitling the holders to a fixed cumulative preferential dividend of £5 per cent. in priority to the ordinary shares, but not conferring any priority as regards capital. Nearly 30,000 shares were subscribed for. In 1925 the whole of the company's premises and their contents were destroyed by fire. The company recovered money from the insurers and the question arose how the surplus left after paying the debts and the return of the capital should be divided as between the ordinary and preferential share-holders. One of the articles of the company provided that subject to the rights of members entitled to shares issued upon special conditions the profits of the company shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively.

*Held,* that the surplus assets were profits of the company within the meaning of the Article and that they should be distributed amongst all the share-holders *pro rata* in proportion to the amount paid up on their shares.

*Per Eve, J.* :—"The surplus assets are profits of the company and equally so whether the surplus represents excess of receipts over payments in previous years accumulated as reserve funds for particular or general purposes, but never so applied, or whether it is derived from the realisation of the company's property at prices in excess of the value placed upon it in the company's books and accounts".

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BOORNE *v.* WICKER, (1927) 1 Ch. 667.

*Sale of Good-will—Vendor's duty not to solicit customers —Rule whether applicable to vendor's executor.*

*Held,* that the principle in *Trego* v. *Hunt,* (1896) A. C. 7, that a vendor of the good-will of a business ought to be restrained from soliciting customers of the business is equally applicable to the case of an executor of the vendor, who is bound to carry out the contract.

*Per Tomlin, J.* :—"Where a man has entered into a contract for the sale of a business which it falls to his executor to complete, in my judgment the executor who, on completion of the contract, proceeds to solicit the customers of the old firm is doing the very thing condemned by Lord Macnaughten in

*Trego* v. *Hunt.* He may or may not have actual knowledge of who the customers of the firm are, though he certainly has every opportunity of ascertaining them, but whether or not he has actual knowledge of them, it seems to me to be against common honesty that he should be free at one and the same time to complete his testator's contract and to snatch away from the purchaser the property which he is affecting to convey to him."

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GEORGE BANHAM & Co. *v.* F. REDDAWAY & Co., (1927) A. C. 406 : 96 L. J. Ch. 117 (H. L.).

*Trade-mark—Application to register—Mark not distinguishable in England—Applicant agreeing to limit use of mark to goods exported to foreign countries—Registration whether compulsory—Trade-marks Act,* 1905, *S.* 9 (5).

Where in an application for the registration of a trade-mark it was found that the mark was not distinguishable from other marks in England but the applicant showed that he did not use the said mark in England and that he would use the same only on goods exported to foreign countries

*Held,* that the whole idea of a trade-mark was to register it for use in England and that a mark otherwise not registerable did not become registerable because the applicant consented to a condition that he would only use it in certain other places.

*Per Lord Dunedin* :—" The registration of a proposed trade-mark is not an absolute right. It is a privilege which under certain circumstances so far approximates to an absolute right that it must be granted...... What has to be considered is the possible confusions or difficulties which might arise in consequence of the grant of the trade-mark or the possible impairment of the rights of innocent traders to do that which it would be their natural mode of conducting their business..... It is one thing to limit the use of a trade-mark registered in this country by declaring that it is only to be used in certain countries besides this: it is quite another to try and make a mark *ex hypothesi* unregisterable here effective as a trade-mark elsewhere by saying that its use would be applied to certain other specified countries. The whole idea of a trade-mark register is for use in this country, and I cannot think that merely affixing the mark in this country when *ex hypothesi* that mark when affixed cannot be used in this country at all meets the intendment of the Act."

VINCENT v. SOUTHERN RAILWAY Co., (1927) A. C. 430 (H. L.).

*Railway company—Statutory duty to post look-out man—Delegation if permissible—Liability of company for default of agents—Contributory negligence of workmen—Claim for damages under Lord Campbell's Act—Prevention of Accidents Rules, 1902, R. 9.*

R. 9 of the Prevention of Accidents Rules provides as follows: "With the object of protecting men working in or near lines of railway..... the railway companies shall in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men and the persons employed shall be expressly instructed to act for such purpose. . . "

One day two workmen who were engaged in repairing the locking bar on the down line of a railway company saw a down train approaching and stepped aside for safety, not seeing the up train they went on to the up line, were struck and killed by the up train. It appeared that the Railway company had by its rules expressly delegated the function of keeping the look-out to the foreman or other man in charge of the gang for the time being. In an action for damages under Lord Campbell's Act by the widow of one of the victims

*Held*, that the accident was due not to any negligence or breach of duty on the part of the company but was due to the carelessness of the workmen themselves; that assuming there was no look-out man employed it was due to the neglect of the deceased because that duty had been delegated by the Railway company to the gang and that therefore the representatives could not recover for the consequences of the default of the deceased.

*Per Viscount Cave, L. C.* :—"The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself."

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*Per Lord Sumner* :—"It is not a breach of the rule on the company's part to delegate to the foreman (as an incorporated company must delegate to some one) the duty of posting a look-out man *ad hoc,* who has been previously instructed, equipped and provided for the purpose."

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LAKE *v.* SIMMONS, (1927) A. C. 487 (H. L.).

*Insurance Policy—Exception clause as to theft by customer—Goods obtained by fraudulent pretences—Formation of contract—Relation of 'entrusting to customer' if constituted—General and special customer.*

*L* a jeweller became insured by a Lloyd's policy underwritten by *S*. The perils insured against were loss or damage to any property arising from any excuse with certain exceptions set out. The exception clause provided that the insurers were not liable for "loss by theft or dishonesty committed by ..... any customer in respect of goods entrusted to him by the assured.... unless such loss arise when the goods are deposited for safe custody with such person". It happened that *E* a practised criminal made representations to *L* that she was the wife of a well-known man and after making several purchases at short intervals and paying for the same on her own account she obtained two valuable jewels for approval and feloniously appropriated the same to her use. In an action by *L* against *S* on the policy for recovering the value of the jewels

*Held,* by the House of Lords reversing a judgment of the Court of Appeal in (1926) 2 K. B. 51 and restoring a judgment of McCardie, J., in (1926) 1 K. B. 366, that the insurers never intended to deal with *E* except as the wife of the well-known personage, that there was no *consensus ad idem* for the formation of a valid contract and that the relation of "entrusting to a customer" within the meaning of the exception clause did not arise. Also, that *E* was not a customer of the insured *quoad* the goods, the possession of which was handed over to her, within the meaning of the exception, though she may have stood in the relation of customer in other transactions.

*Per Viscount Sumner*:—"The natural meaning of 'entrusted' involves that the assured should by some real and conscious volition have imposed on the person, to whom he delivers the goods, some species of fiduciary duty".

REPUBLICA DE GUATEMALA *v.* NUNEZ, (1927) 1 K. B. 669 (C. A.).

*Conflict of Laws—Assignment of English debt in Guatemala—Parties domiciled in Guatemala—Validity of assignment in question—Law of domicil applicable.*

One *C* domiciled in Guatemala, and being there at the time, deposited in an English Bank in England a sum of money, thus creating a debt due by an English debtor, which must be demanded in England, but which, having been demanded in England, could be recovered by suit against the debtor in whatever jurisdiction he could be found. Some years after one *N* also a Guatemalan subject claimed the deposit from the English Bank. He produced a document passing between himself and *C* in Guatemala, both parties being then domiciled there, purporting to be an assignment or donation of the English debt. It was proved that if the effect of the document was to be determined by the law of Guatemala, the document was invalid, if by English Law there was a valid assignment. The question arose which law applied.

*Held,* by the Court of Appeal affirming a judgment of Greer, J., that English Courts should decide the question according to the law of Guatemala, and therefore *N* had no claim to the money.

*Bankes, L. J.* based his decision on the ground that the law of *domicil* was applicable to such a case. Scrutton and Lawrence, JJ., decided on the ground that either the law of *domicil* or the law of the place where the assignment took place was applicable.

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LEONARD *v.* WESTERN SERVICES, LTD., (1927) 1 K B 702.

*Motor omnibus—"Plying for hire", what constitutes—Town Police Clauses Acts,* 1847 *and* 1889.

*W* were the owners of a number of motor omnibuses and ran a regular service in some districts. *L* entered an omnibus one day and purchased a return ticket; she then got out in a district wherein *W* had no licence to ply for hire. Subsequently *L* got into another omnibus at that place and returned to her district.

*Held,* on those facts that the latter omnibus was not 'plying for hire' within the meaning of the Town Police Clauses Acts, 1847 and 1889.

*Per Salter, J.* :—"In order to constitute 'plying for hire' within the meaning of the Acts there must be a general invitation by the person in charge of the vehicle to members of the public to make contracts with him for carriage in the vehicle."

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MOLTHES REDERI AKTIESELSKABET *v.* ELLERMAN'S WILSON LINE, LTD., (1927) 1 K. B. 710.

*Shipping—Charterparty—Sub-charter for voyage—Shipowner's lien for freight—Bill of Lading contract one between shipper and shipowner.*

"In every case where bill of lading freight is received by the agent nominated by the charterers the shipowner can intervene and claim freight in the hands of the agent as his money. This is a result of holding that the bill of lading contract is one between the shipowner and shipper and not a contract between the charterers and the shipper. The legal right to the freight is in the owner and not in the charterer and the former can intervene at any time before the agent has received the freight and say the collections should be on his behalf. If the agent then collects the freight the shipowner can sue for it as money had and received".

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MARTIN *v.* BENSON, (1927) 1 K B 771.

*Costs—Disallowance for good cause—Contemptuous damages awarded in action for slander—Proper order as to costs—Rules of the Supreme Court, O.* 65, *R.* 1.

O. 65, R. 1 of the Supreme Court Rules provides that where an action is tried with a jury the costs shall follow the event unless the Court for good cause shall otherwise order. Where in an action for slander the plaintiff was awarded 1 3|4*d* by way of damages, ***held,*** that the proper order was that the defendant need not pay the plaintiff's costs.

***Per McCardie, J.*** :—"The Judge must exercise his discretion as to costs, not only unfettered by, but wholly independently of any view expressed by the jury on that particular matter.... The smallness of the damages is an important element to be considered but it is not conclusive. But in the absence of special circumstances the Court may disallow costs where contemptuous damages are awarded....... In such cases the action should be regarded as oppressive and as one that should not have

been brought and that therefore 'good cause' exists for disallowing costs."

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REX *v.* CORY BROTHERS & CO., (1927) 1 K B 810.

*Corporation—Indictment for felony and for crimes involving personal violence—Legality—Criminal Justice Act,* 1925, *S.* 33.

S. 33 of the Criminal Justice Act, 1925 provides that "where a corporation is charged with an indictable offence the examining Justices may......make an order empowering the prosecution to present...... a bill in respect of the offence..." A corporation was charged with the offence of manslaughter and an offence under the Person Act, 1861.

*Held,* that a corporation could not be indicted for a felony or for crimes involving personal violence and that this rule was not modified by S. 33 of the Criminal Justice Act.

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KREDITBANK CASSEL *v.* SCHENKERS, (1927) 1 K. B. 826 (C. A.).

*Company—Articles of Association providing for delegation regarding signing Bills and cheques—Branch manager forging bills—Company whether bound.*

The doctrine that persons dealing with limited liability companies are deemed to have notice of the company's articles of association and need not inquire whether the domestic arrangements necessary to carry out the power of delegation there given applies only to a genuine transaction and not to a forged document.

A company by its articles had authority to delegate the power of drawing and endorsing bills but in fact it did not delegate anybody; but one of its branch managers as such signed bills of exchange and fraudulently obtained credit. The bills being subsequently dishonoured the drawee sued the company.

*Held,* by the Court of Appeal reversing a judgment of Wright, J., in (1926) 2 K. B. 450—

(1) that there being no proof that the person dealing with the company had knowledge of the existence of the power of delegation given to the company he cannot be heard to say that he acted upon it. *Houghton and Co.* v. *Nothard; Lowe* v. *Wills,* (1927) 1 K. B. 246 followed;

(2) the rule that persons dealing with a company must be deemed to have notice of the articles of association was inappli-

cable because the bills of exchange were forged documents. *Ruben's Case*, (1906) A. C. 439 applied;

(3) that it was not within the ostensible authority of the branch manager to sign bills for the amount and in the form he did.

The action was consequently dismissed.

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REX *v.* DAILY MIRROR. *Ex parte* SMITH, (1927) 1 K. B. 845.

*Contempt of Court—Newspaper publishing photograph of accused before trial—Question of identity in issue—Liability of newspaper for contempt.*

"In the publication of a photograph no less than in narrative, it is the duty of a newspaper to take care to avoid publishing that which is calculated to prejudice a fair trial.... There is a duty to refrain from the publication of the photograph of an accused person where it is apparent to a reasonable man that a question of identity may arise".

Where at a time when the accused had been arrested upon a charge of attempting to shoot a police officer and had been brought before the Justices upon the charge and before the proceedings were completed two newspapers published the photograph of the accused

*Held*, that the newspapers were liable to be charged for contempt of Court because the identity of the accused was in issue in the case and the accused had been prejudiced regarding the same.

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IMPORTERS COMPANY *v.* WESTMINISTER BANK, (1927) 1 K. B. 869.

*Banker and Customer—Banker receiving payment on behalf of another bank—Customer bank subsequently proved to have no title—Liability of banker—Collecting bank whether "receives payment"—Bills of Exchange Act*, 1882, *S.* 82.

S. 82 of the Bills of Exchange Act, 1882 provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque.... and the customer has no title.... the banker shall not incur liability to the true owner of the cheque for having received such payment".

*Held*, that the word 'customer' in the section can mean another bank for whom the bank claiming protection collects a

cheque as agent; also that the expression 'receives payment' applies not only to a receiving bank but also to a collecting bank.

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*In re* ROPUER SHIPPING COMPANY AND CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, (1927) 1 K. B. 879 (C. A.).

*Shipping—Claim for demurrage—Owners using vessel for bunkering—Claim not sustainable for that period—Burden of proof.*

In order that demurrage may be claimed by the owners of a vessel they must at least do nothing to prevent the vessel being available and at the disposal of the charterers for the purpose of completing the cargo.

*Held,* on the facts that demurrage could not be claimed during the period when the vessel was used by the owners for bunkering and was therefore not available for the charterers.

*Per Sargant, L. J.* :—"When it is shown that, by the act of the owners, the vessel has been placed in a position which renders her unavailable for the charterers' purposes in loading the cargo, it is for the owners who claim demurrage to show that the charterers had not in fact cargo available for loading during the period the vessel was used for bunkering".

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KOECHLIN ET CIE *v.* KESTENBAUM BROTHERS, (1927) 1 K B 889.

*Bill of Exchange—Foreign Bill—Endorsement in foreign country and acceptance in England—Validity of endorsement to be determined by foreign law—Bills of Exchange Act,* 1882, *S. 72.*

A Bill of Exchange was drawn and endorsed in France and accepted in England. It appeared that the endorsement was not by the payee but by his agent and that such endorsement though valid under French law was invalid under the English law.

*Held,* that under S. 72 of the Bills of Exchange Act, 1882, the validity of the transfer of the Bill of Exchange must be governed by the law of the country in which the transfer took place and that consequently there was a valid endorsement.

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REDERI AKTIEBOLAGET ACOLUS *v.* W. N. HILLAS & Co., 96 L J K B 186 (H L).

*Shipping—Charterparty—Provision that expenses for discharging cargo should be borne by charterer—Same to be borne by ship under port custom—Which prevails.*

A charterparty provided that the cargo was to be loaded and discharged according to the custom of the port and that the cargo was to be taken from alongside the steamer at charterers' risk and expense. The question arose as to who should bear the cost of putting up a staging from the ship to certain rails and carrying the goods across the staging and placing it on bogies on those rails. The charterers pleaded that there was a custom of the port under which the expense in dispute was to be paid by the ship.

*Held,* that the custom of the port could not override the express provisions of the charterparty and that consequently the charterers were liable for the expense.

(1922) 1 A. C. 397 applied.

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GALE *v.* MOTOR UNION INSURANCE Co., 96 L J K B 199.

*Insurance—Two policies of insurance—Provisions in each policy denying liability in case of insurance with others and for rateable distribution—Construction—Rateable distribution as meaning half and half.*

The claimant had insured with two companies against loss resulting from motor collision. Each of the policies provided that if there was another operative insurance, it, the policy in question, could not be used to give any indemnity, but each policy also provided that if there were two policies which were operative then there was to be rateable contribution or payment. In an action for indemnity against both the companies

*Held,* that the proper construction of the clauses was that the provision as to rateable distribution qualified the preceding clause denying liability and that the proper award was that the claimant should be paid rateably by the two companies, that is in the proportion of half and half.

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HOUGHTON & Co. *v.* NORTHARD; LOWE *v.* WILLS, 96 L J K. B. 25 (C. A.).

*Company—Contract by director not in the course of business—Validity—Power of delegation vested in Board of Directors—No delegation in fact—Third party whether entitled to assume delegation.*

An ordinary director, acting without authority in fact, is not capable of binding a company by a contract with a third party which is not in the ordinary course of business, merely on the ground that the third party assumed that the director had been given authority by the Board to make a contract. In such a case it is immaterial that the articles of association contain wide powers of delegation by the Board of Directors.

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SHUTTLEWORTH *v.* COX BROS. & CO., 96 L J K B 104 (C. A.).

*Company—Alteration of article by special resolution—Test of* bona fide*—Interference by Court—Companies Act*, 1918, *S.* 13.

The power given to a company under S. 13 of the Companies Act "to alter or add to its articles by special resolution" must, like all other powers conferred on majorities, be exercised *bona fide* and for the benefit of the company. The true judges of the interests of the company in such a case are the shareholders acting in good faith. Their decision is not liable to be set aside unless it is so outrageous and oppressive that no reasonable man could arrive at such a conclusion.

*Allen* v. *Gold Reefs of West Africa,* (1900) 1 Ch. 656 applied.

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## JOTTINGS AND CUTTINGS.

*Clearing the Bar.*—It was not until the case of *Malan* v. *Young* in 1889 (6 T L R 38) that any attempt was made to exclude the public from a Court in which ordinary civil proceedings were in progress. The action was one of libel and slander Sir Charles Russell, Q. C., Mr. Finlay, Q. C. and Mr. Blake Odgers represented the plaintiff and Mr. Frank Lockwood, Q. C., Mr. Collins, Q. C. and Mr. Cagney the defendant. When the case was called on Sir Charles Russell intimated that it had been agreed between himself and his learned friends that, in the interest of third parties, it was desirable that the hearing should be in private. Denman, J., doubted whether he could give effect to their wish, but after consulting with some of his colleagues, stated that if the case were tried before him without a jury he would hear it in "camera". The jury was accordingly discharged and the Court cleared.

Some members of the Bar, not engaged in the case, were present on this occasion. One Village Hampden—Mr. Gould, Q. C.—asserted his right to remain in Court, but the Judge, having intimated that force would be employed if necessary, he peacefully withdrew.

—*The Law Journal*, April 23, 1927, p. 416.

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*Family and State in Criminal Jurisprudence.*—Insufficient attention has been drawn in the English Press to the extraordinarily interesting peculiarity of French criminal procedure, of which an instructive illustration has recently been afforded by *L'Affaire Daniels* at Boulogne. Here a French leader of the Paris Bar, instructed by the family of the deceased English lady, has attended the preliminary investigation by a magistrate and has put forward claims on behalf of the family of the deceased, *e.g.*, for an exhumation of the body, which has been supported by the order of the Court. It is not generally known except by lawyers who have had occasion to follow French judicial proceedings, *e.g.*, in a murder prosecution—that there are three parties to the case, not—as in England—two only. There is the Republic, the accused, and the next friend of the deceased, usually a member of his family. The latter has not only a right to be present and to put questions in cross-examination of witnesses, but he also has a right to be heard by the jury on the issue as to the damages which the accused, if found guilty, may, under French law, be held liable to pay the relatives.

—*The Law Journal*, May 7, 1927, p. 439.

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*Deterrent Sentences.*—The question of what are the objects of punishment is one which gives rise to a good deal of discussion, and on which there is a considerable difference of opinion. Some there are who hold that the particular crime of which the prisoner has been convicted should alone weigh with the Judge, and that the object of a penal sentence should be less to punish than to reform; others take the view that one of the matters to be borne in mind is the deterrent effect which the sentences inflicted for a particular offence may have on those minded to commit similar crimes. We do not propose to enter into a discussion on the ethics of punishment, at any rate at the moment; it is probably true to say that certain classes of crime can be checked by the deterrent effect of the sentences inflicted upon

persons convicted of such crimes, and that, in other classes of crime, this consideration does not apply. If there is one class of offence in which severity on the part of the judges is more likely than another to be salutary in checking the commission of other offences, we imagine that that is blackmail, and, for this reason, and quite apart from the merits of the particular case, we are glad to observe that the Lord Chief Justice has, this week, dealt with a gang of blackmailers convicted before him at the Old Bailey in a manner which will make blackmailers generally consider very carefully whether their game is likely to be worth the candle.

*The Law Journal*, May 28, 1927, p. 507.

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*The Good Lawyer and the Bad Cause.*—It is fitting to pass on for the benefit of those lawyers whose consciences are open to assault the advice which McCardie, J., at the "Reading" aforesaid, approved and quoted from the patriotic and pious Dr. Johnson: "How can a righteous man accept a brief for a party whose cause was bad?" Dr. Johnson: "Who can know whether a party is in the wrong until a judge decides the issue?" Sometimes, of course, the party himself knows and opens his mind to his counsel as a good patient will to his medical adviser. And in criminal causes there may be difficulties. Many a prisoner has, in the cells, told true things to his visiting counsel; and there is the case where an accused person sent a messenger to counsel with the declaration that he was not guilty; and that, after acquittal "half the swag" should be the advocate's reward. No; upon the whole, it would appear that Dr. Johnson's formula is inadequate; and McCardie, J., should know it.

—*The Law Journal,* May 28, 1927, p. 524.

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*Witchcraft and the Law.*—It is interesting, if a little surprising, to find a confession of belief in witchcraft, but Mr. Montague Summers in his *History of Witchcraft,* published last year—which contains much curious learning about witches and demons and their ways from the earliest times—comes to the conclusion that, while the witch persecutions were in general due to "atrocious extravagances" and the "idlest superstition", yet there is no way of accounting for "a huge number of cases" save by "acknowledging the reality of witchcraft and diabolic contracts". And he fortifies himself with a long

list of eminent men who all firmly believed in witchcraft. It begins with St. Augustine and comes down to William Blackstone, and among the intermediate names are Lord Bacon, Sir Edward Coke, and Sir Matthew Hale. We are not concerned to argue the question, and it is quite true that great judges have in this respect failed to rise above the superstitions of their times and have taken part in witch trials and witch killings that form one of the darkest passages in the history of the Criminal Law. The number who suffered, both here and on the Continent, is incredible. "It was sufficient", it has been said, "to be aged, poor, or half-crazed to ensure death at the stake or on the scaffold". Quite recently Lord Birkenhead, in his *Fourteen English Judges*, has excused Hale for his part in the trial of the Suffolk witches in 1662, on the ground that "the law affirmed the existence of witchcraft and made it an offence and Hale himself believed in witchcraft". And Judge Parry, who, in his chapter "Concerning Witchcraft and Wizardry", tells of the persistence of the superstition in remote country districts, thinks that Hale, "a civilised and learned man", need not be scoffed at for beliefs which have lasted for 300 years since his time. In any case Hale was no worse than the judges of a later day who lent themselves to the infliction of capital punishment for petty offences which would now be met by probation. However, in an age which is not exactly an age of robust faith, it is, as we have said, interesting to find a serious author asserting that there must be something in witchcraft after all.

—*The Law Journal*, June 11, 1927, p. 545.

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*The Judiciary and the Executive.*—It is the considered opinion of many that there is a real danger lest the "constitutional balance" between the executive and judicial functions of the State may be seriously upset by the growing tendency of the Legislature to transfer large judicial and even law-making powers to the various government departments. The powers conferred on the Minister of Health under the Public Health (Smoke Abatement) Act, referred to in these columns recently is merely the latest example of a long series; a tendency so marked that some critics profess to see in it a deliberate policy having for its object the transfer of power into the "safe" hands of the permanent Civil Service, which may be trusted to preserve much of what it has been given throughout the short and uncertain lifetime of a modern Parliament. For (it is

said), however reforming or revolutionary a Government may be, the altering of the *status quo* is of necessity a long and tedious business, even with the hearty co-operation of the Civil Servants; and powers conferred on the "Minister" are powers nearly always in fact exercised by the expert and permanent secretary or other permanent head of the Department. The facts appear to be all against the existence of a policy, but the tendency is indisputable. It is due in large measure to the extension of Government interference and control to matters formerly regarded as entirely outside its province: Public Health, Urban Administration, Railways, Roads, Broadcasting, are a few. In such and similar matters, the "Ministers" have and exercise powers which would have astounded the politicians and constitutional lawyers of last century. They can compulsorily take away land and other property from the lawful owners, can destroy rights acquired by purchase or inheritance, and can do by the stroke of the pen that which formerly required the authority of a special Act of Parliament.

—*The Law Journal,* June 11, 1927, p. 547.

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*The Judges' Warning.*—It may be assumed that the frequent protests of the Lord Chief Justice—as in a recent case where he pointed out that a Minister could at once nullify the effect of a judgment of the High Court by merely issuing an order under the authority conferred on him by Act of Parliament—are not without foundation, and it is noteworthy that Eve, J., the senior Chancery Judge, and one extremely unlikely to be stirred by groundless apprehension, has "heartily supported the protests which from time to time had been uttered by the Lord Chief Justice and others against attempts of the Executive to invade the territory of the magistracy. If the administration of justice was to be continued in this country upon the principles upon which it had been firmly established, and which alone were acceptable to the people, it was of the utmost importance that the line of demarcation between the Executive and the Magistracy should be studiously and strenuously maintained ........ our Courts offered a more satisfactory arena for the assertion of right and the remedy of wrong than any Government Department, however august, and he hoped every effort would be made to control any insidious attempt of the

Legislature to curtail the right of every citizen to have recourse to the Courts." No doubt the citizen feels that Parliament, which gave these powers, can take them away. But the taking away will not be an easy or a painless performance, and we agree with the Judges that prevention is better than cure.

—*The Law Journal*, June 11, 1927, p. 547.

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*Machiavelli.*—Those who are interested in theories of statecraft have been celebrating the 400th anniversary of the death on June 22, 1527, of Nicolo Machiavelli, the writer of *Il Principe.* Machiavelli stood for the divorce of morality and politics. As to why he took this line there are opposing views. Amid the internecine struggles of Italian States, he may have thought that the strong ruler—the Prince—regardless of means so he gained his end, was the only way to restore Italy to unity and greatness. The parallel with modern conditions in Italy and Russia is too obvious to call for comment, save to note the difference that character or circumstances have saved Italy from the crimes which have marked the present *regime* in Russia, and which have recently been repeated in a specially revolting form. This view of Machiavelli's teaching so impressed those times that Shakespeare, some hundred years later, in the Third Part of *King Henry the Sixth,* made Gloucester boast that he could

"Set the murderous Machiavel to school."

Or was Machiavelli, writing in banishment from Florence, only fawning on Lorenzo de' Medici, to whom his work was addressed, in the hope of being recalled to favour? This is speculation, but as to the tendency of his work there is no doubt. He recapitulates the means by which Cæsar Borgia attained to power, and on serious examination of his whole conduct, he sees "nothing to be reprehended." And force and fraud are equally useful to a prince. "A Prince who is wise and prudent cannot or ought not to keep his parole, when the keeping of it is to his prejudice, and the causes for which he promised removed." It may be long before the practice of politics, national and international, is based completely on the canons of humanity and morality, but Machiavelli's disregard of these canons seems to have shocked his own times as much as it shocks the present.

—*The Law Journal*, June 25, 1927, p. 593.

*Swift, J., utters a Good One*.—The observation which recently fell from the lips of Mr. Justice Swift, when he expressed the view that in a certain matter a brother Judge had "lapsed into inadequacy," is generally regarded as one of the best of its kind, and its originality has not yet been impeached.

Perhaps the classic example of the mode in which a judge may convey an impression not wholly favourable of one of his judicial brethren is that of Bowen, L. J. : "In coming to the Court of Appeal, the judgment of my brother Kekewich in your favour is like putting to sea on Friday—unfortunate, but not necessarily fatal." Mathew, L. J., achieved a double in one sentence when he remarked that "his brother Kekewich had misdirected himself in point of law by attaching undue weight to an *obiter dictum* of his brother Ridley."

Counsel have sometimes ventured to suggest that the judge who tried the case was wanting in judicial prestige. "This, my lords, is an appeal from Mr. Justice Dash, but there are other reasons for saying that the appeal should be allowed" is the traditional exordium in opening an appeal in such cases. Mr. Upjohn, K. C. (a courageous advocate), opening an appeal from the Divisional Court, said that he was appealing from a judgment of Mathew, J. "But I thought," said the Master of the Rolls, "this was an appeal from the Divisional Court?" "It is true," replied Upjohn, "that Chief Justice Coleridge was also present." It should perhaps be explained that from time to time Lord Coleridge closed his eyes during the course of an argument.

—*The Law Journal,* June 25, 1927, p. 610.

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## BOOK REVIEWS.

THE ART OF CROSS-EXAMINATION, Vol. I, by Messrs. P. Ramanatha Aiyar and P. Raghava Aiyar, revised, enlarged and brought up to date by Mr. K. S. Venkatrama Aiyar, B. A., B. L., High Court Vakil. Published by the Globe Publishing Company. Price Rs. 3-8-0 per volume.

The learned authors of this book have dealt in the course of this volume with the principles and precedents of the art of cross-examination. Several books have been published on this subject here and in England. The art of cross-examination comes largely by experience but there are principles which a

beginner has to learn before starting on this very difficult art. As it is gained largely by personal experience and the observation of the conduct of cases by eminent advocates, the authors have done well in paying greater attention to the collection of precedents than to the enunciation of mere principles, as illustrations and precedents leave a clearer and more lasting impression than a statement of the principles. The authors have mainly attempted to collect as far as possible instances where success has been attained in cross-examination by eminent advocates in different countries and in different times. The book is therefore likely to be not only full of instruction but of great interest.

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CONTRACT ACT MADE EASY—QUESTIONS ON THE INDIAN CONTRACT ACT WITH FULL ANSWERS, by Mr. N. K. Ponkshe. Price Rs. 1-4-0.

In these pages the author has selected the questions on the Indian Contract Act from the various law examinations of the Indian Universities for the last twenty-five years and the answers to them are given concisely and clearly with the important case-law thereon. If the object of the publication is to supplant the well-known treatises on the Indian Contract Act to the student of law one cannot but regret its publication. We venture to think that the object of the author is on the other hand that after the student has carefully studied the leading treatises on the subject he should take to this book to collect his thoughts and clarify his answers to the questions from the treatises he has already studied. We believe that the readers of this book will not abuse it by leaving out the treatises and relying upon it solely for securing a pass in the examination.

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## QUICQUID PLANTATUR SOLO CEDIT.

The general rule of English Law is *Quicquid plantatur solo cedit,* that is to say whatever is affixed to the land becomes a part of the land and becomes subject to the same rights of property as the land. A necessary corollary of that rule is that a man who so affixes is neither entitled to remove it nor is entitled to compensation in respect of it. Some exceptions have been recognised by the common law itself though not in very early times and some exceptions have since been engrafted by the Legislature. In India, the maxim has at all times been held to have but a very limited application. As regards the corollary as to compensation, the Indian Law has been in some directions more liberal while in others not quite so liberal. We shall attempt to note the scope of the application of the maxim and the corollary both in England and in this country.

The first exception recognised in England is with respect to what is known as fixtures, that is to say personal chattels affixed to the land. As regards these, questions arise in England generally as between heirs and executors, between tenants for life and remaindermen and lastly between landlords and tenants. The law is most liberal in the case of tenants, less liberal in the second case and least of all in the first ; in fact in the first case, the rule is applied in all its rigour though after the recent Property Act, the question is not of much moment as both real and personal property now vest in the executor and the same rule applies as regards distribution. In the interests of trade, Courts relaxed the strictness of the rule in favour of trade fixtures. The concession does not, however, extend in favour of buildings unless they are of a temporary nature or are accessory to trade purposes. The indulgence

shown to trade is not extended to agriculture and to remedy the defect, Legislature had to step in but the result has been that a more liberal rule is enacted conferring a right to remove not only fixtures but also buildings. The Statute, at the same time, gives a right of pre-emption to the landlord. Fixtures for ornament and convenience also have been exempted from the operation of the rule and that by the common law itself. All these are merely in the nature of partial exceptions, that is to say the rule only confers a power on the tenant to remove the fixtures but so long as they continue attached, they are considered as a part of the land itself. The Common Law right to remove is also subject to the condition that the nature of the attachment must be such that the separation will cause little or no damage to the freehold or the articles removed and that the right can be exercised only during the currency of tenure except when the tenancy is of an uncertain duration in which case a reasonable time after the expiry of the lease is allowed. Under the rule enacted in the Agricultural Holdings Act the tenant's right is available in all cases for a reasonable time after the termination of the tenancy and apparently the tenant is entitled to remove though the removal might cause damage provided he is prepared to make good the damage. The benefit of the rule allowing tenants to remove fixtures is available though the fixtures are affixed after a mortgage. The mortgagor himself is not within the benefit of the rule.

As regards trees, the rule seems to be that fruit trees may not be cut by the tenant though planted by himself nor timber trees except in the case where enjoyment by cutting down timber is within the contemplation of the lease. The tenant seems to have the right to cut down certain kinds of trees that are not timber and even timber trees which show no likelihood of becoming useful timber. In this matter the rule is governed largely by usage.

In India the maxim is of very limited application, the question being rather as to what cases it applies than to what cases it does not. In *Thakur Chunder Poramanick* v. *Ramdhone Bhuttacharjee* (1), a Full Bench of the Calcutta High Court after referring to certain texts of Hindu Law and to Hedaja laid down that "according to the usages and customs of this country, buildings and other such improvements do not, by the mere accident of their attachment to the soil, become the property

1. (1866) 6 W R 228 (F B).

of the owner of the soil". They further held that "it should be laid down as a general rule that if he who makes the improvements is not a mere trespasser but is in possession under any *bona fide* title or claim of title he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he might possess." The case itself was that of a purchaser from a widow whose purchase was found not binding against the reversioner. Earlier cases are referred to in the judgment of the Full Bench where a similar principle was applied to co-owners including members of Hindu family building on common land. In one of those cases *Khode Ram Sharma* v. *Trilochan* (2) it is laid down that "if a member of a joint Hindu family build a brick house on ancestral land with separate funds of his own, such land would not be a property in which shares might be claimed by his co-parceners. Co-parceners would only have a claim on him for other similar land equal to their respective shares". This principle was applied recently in Madras to a case where a Hindu father built on ancestral site before the birth of his son and it was held that the building did not become joint property in which the son could claim a share. *Periakaruppan* v. *Arunachelam* (3). The rule laid down in *Thakur Chunder Poramanick* v. *Ramdhone Bhuttacharjee* (1) is approved by the Privy Council in *Narayan Das* v. *Jatindra Nath Roy* (4) which was rather an extreme case. There the question was as to whether a house built on land by the registered proprietor of an estate passed to the auction purchaser at the revenue sale. Their Lordships held that it did not. That ruling will not apply to revenue sales in Madras for the Madras Revenue Recovery Act makes the revenue a charge not only on the land but also on buildings, etc., on the land unlike the Bengal Act therein referred to. Their Lordships base the conclusion on the fact that under that Act the Crown can sell only the property which belongs to it and the

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1. (1866) 6 W R 228 (F B). 2. 1 Select Reports, p. 35.
3. (1926) I L R 50 M 582: 52 M L J 571.
4. (1927) L R 54 I A 218 : 53 M L J 158 (P C).

superstructure does not belong to it and no power is reserved in the Act to sell the buildings or anything other than what belongs to the Government. The following according to their Lordships are the rights *inter se* of the owner of the land and the owner of the superstructure after the termination of the interest of the latter in the land: (*i*) The plaintiff (owner of the land) would have had the right to call upon the defendants to remove the house. If the defendants did remove the house, the value would be small and in the ordinary course would be no more than what has been called "demolition value", *viz.*, the value of the materials less the cost of removal, (*ii*) if the defendants did not remove the house, they would lose it, (*iii*) if the defendants were called upon to remove the house, they would be entitled to a reasonable time for such removal and that during that time, plaintiff would be kept out of the enjoyment of the land. Their Lordships would have this as well as the circumstance that the landlord might have been a willing purchaser to be taken into consideration in assessing the amount to which the defendants would be entitled out of the compensation money assessed for the whole land and buildings under the Land Acquisition Act. It is thus perfectly clear that the owner of the superstructure is entitled to a reasonable time to remove the superstructure after the termination of his interest and his right is not limited to its removal during the continuance of the interest. In *Rama Aiyar* v. *Narayanaswami Aiyar* (5) an alienee from a widow who was found not to have had *bona fide* belief as to his title at the time of effecting the improvements was given by the decree time to remove them. In *Narayan* v. *Bholagir* (6) a purchaser with notice of prior agreement of sale as well as the sale in pursuance thereof was allowed to remove the materials In *Beni Ram* v. *Kundan Lal* (7) the Privy Council allowed a tenant time to remove buildings put up by him. In *Ismai Kani Rowthan* v. *Nazarali Sahib* (8) the same view is taken though there are certain unintelligible observations in the judgment sounding in the contrary sense which led to considerable difference of judicial opinion, but the view that ultimately prevailed was that the tenant was entitled to remove after the termination of the tenancy but if he was given reasonable opportunity to do so after being deprived of possession and

5. (1925) 51 M L J 313. 6. (1869) 6 B H C 80.
7. (1899) L R 26 I A 58. 8. (1903) I L R 27 M 211 14 M L J 25.

failed to avail himself of the opportunity so given, he has no further right to the materials. That view is in accordance with the view expressed by the Privy Council in *Narayan Das* v. *Jatindra Nath* (4). It is difficult to find a legal basis for such a conclusion. Under the English Law the rule is that fixtures form a part of the holding and the tenant is given in certain circumstances a right to remove them. Such being the case his failure to remove might disentitle him to make any further claim in respect of it. In India, where the theory is that the building does not become a part of the freehold, the mere fact that the tenant did not remove in time could not transfer the ownership in it to the landlord. The decision of the Privy Council, however, seems to conclude the matter. The right to remove during the continuance of the lease is recognised by S. 108 of the Transfer of Property Act and that is in no way inconsistent with the right to remove at or after eviction recognised by the decisions.

In *Premji* v. *Haji Cassum* (9) a person who had encroached on the plaintiff's land and had built a house on it was held entitled to remove the building and if he did not do so within a year of the decree the time given to him to remove the building, it was ordered that the plaintiff might get it removed at the latter's expense. Sargent, C. J., observes therein thus: "It is a well-established law in England that if a stranger builds on the land of another although believing it to be his own, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence to his building on the land. This is also the law in India with the exception that the party building on the land of another is allowed to remove the building." The assumption on which the case proceeds is that the defendant was a person that *bona fide* believed that the property was his own though the facts recited seem to show that he was a mere trespasser. In *Ganga Din Sonar* v. *Jagat Tiwari* (10), which was a case of trespass pure and simple, Mr. Justice Sunder Lal expresses the opinion that even in such a case the decree must give leave to the defendant to remove materials. [See *Bhupendra Kumar* v. *Pyari*

4. (1927) L R 54 I A 218: 53 M L J 158 (P C).
9. (1895) I L R 20 Bom. 298. 10. (1914) 25 I C 198.

*Mohan Roy* (11).] According to Mr. Justice Sankaran Nair not only tenants and *bona fide* possessors of land but even trespassers are entitled to this. Under the Muhammadan Law, that is undoubtedly the rule. [See *Secretary of State* v. *Charlesworth Pilling and Co.* (12)]. Even under the Hindu Law though Narada restricts the right to tenants, as explained in 33 Sacred Books of the East, 143 footnote, the reason of the rule that a trespasser cannot remove is said to be that the owner of the land is thereby compensated for the occupation, implying clearly that the trespasser is the owner of the building.

In *Vasudevan* v. *Chathu Achan* (13) buildings and trees are put on the same footing. It was a case of a Malabar tenant claiming to remove trees planted by him and it was held that the custom that the landlord is bound to pay compensation did not take away the tenant's right to remove the trees conferred by the general law and recognised in S. 108 of the Transfer of Property Act. The Full Bench reads S. 108 as recognising this right unqualifiedly except to this extent, *viz.*, that the tenant is bound to restore the land in the same condition in which it was given to him. [See *Mofiz Sheikh* v. *Rasiklal Ghose* (14)]. It is presumed that in the case of a plantation leased to a tenant, the tenant may not be entitled to any trees planted by him in the ordinary course of management to keep the plantation as such in tact.

The rule applicable to tenants would also apply to mortgages. In *Raghunandan Rai* v. *Raghunandan Pande* (15) a mortgagee was held entitled to cut down trees planted by him which were not an improvement for which the mortgagor was bound to compensate. In *Nageshar Rai* v. *Nand Lal* (16) a different view seems to be taken without advertence to the decision of the Full Bench but the ground on which the judgment is put, *viz.*, that the trees could not be removed without injury would seem to bring the case within the general rule. A question is raised in some Allahabad cases that such trees would be an accession within the meaning of S. 63 of the Transfer of Property Act and if they cannot be separately enjoyed and if the accession was not made in circumstances such as would bind the mortgagee to pay compensation, the mortgagor is entitled to have them without paying compensation (see the last cited case

11. (1913) 40 I C 464. 12. (1901) I L R 26 Bom. 1.
13. (1900) I L R 24 M 47 10 M L J 321 (F B).
14. (1910) 12 C L J 246. 15. (1921) I L R 43 A 638 (F. B).
16. (1925) I L R 48 A 70.

and *Parmanand Pandit* v. *Mata Din* (17)]. Though it cannot be confidently affirmed that S. 63 does not proceed upon the English view as to things attached to the land, the section presents no obstacle to their not being regarded as accessions in accordance with the general theory of the Indian Law. The section does not say what are accessions. In fact, S. 108 similarly provides that accessions are to be deemed to be comprised in the lease but this provision is not considered inconsistent with the other provision that the lessee may remove anything attached to the earth by himself provided he leaves the property in the state in which he received it. The sections must be confined to cases where the non-application of the maxim may not help, for instance to the case of repairs or improvements which do not form distinct structures or which involve great detriment to the corpus in the act of removal. The section cannot be said to be happy. It does not provide in the case of possessory mortgages other than usufructuary for the setting off the interest on the cost against the profits.

In some cases that come before the Indian Courts, the situation is complicated by the peculiar incidents of the estate of the person that improves the property; for instance, if the widow builds on the land belonging to the husband with the income of the estate, the presumption would be that she wanted to incorporate it with the estate and as such it would form an accession to the estate. In some circumstances the same presumption might arise if the buildings are raised by a member of an undivided Hindu family with his own funds. But these complications apart, the general rule ought to be that the buildings erected by a life-owner or a joint owner would not become part of the land. Some of the observations in *Kandarpa Nath* v. *Jogendra Nath* (18) might look at first sight as laying down a principle opposed to the general trend of authority for Mr. Justice Mukherjee is reported as saying there that "as a general rule improvements made on property by a life-tenant thereof attach to the estate and pass to the reversioner or remainderman without any liability on his part to make compensation therefor". But on examination of the facts of the case, it will appear that the improvements were in the nature of reclamation and could not come within the benefit of the rule as to fixtures above referred to. The claim was merely a claim

17. (1925) I L R 47 A 582. 18. (1910) 12 C L J 391.

for the cost of the improvements and the rule laid down is wholly unexceptionable.

S. 51 of the Transfer of Property Act which deals with improvements applies only to transferees and has no application to persons who claim under some other title, such as heirship, nor according to the great bulk of authority to transferees who claim less than absolute title. Act XI of 1855 applies only to cases where the English Law is applicable, though it is not confined to transferees. On the other hand it extends to persons who hold the land *bona fide* in the belief that they have an estate in fee simple or other absolute estate and their heirs or assigns or other under-tenants. There is no such restriction in the Indian rule relating to buildings and other affixtures which applies without regard to the quantum of interest claimed by the person making the improvement or subject to what has been said above the state of his belief as regards his title or the source of his alleged title.

The rule as to the liability to pay compensation for improvements, we shall discuss in another article.

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## SUMMARY OF ENGLISH CASES.

MARSDEN *v.* EDWARD HEYES, LTD., (1927) 2 K B 1: 96 L. J. K. B. 410 (C. A.).

*Landlord and tenant—Oral tenancy from year to year—Implied contract to use premises in tenant-like manner—Structural alterations—Damages.*

"There is an implied contract by a tenant to use the premises let out to him in a tenant-like or husband-like manner and to deliver them up at the end of the term unless prevented from so doing by the act of God. To use the premises in a tenant-like manner means that a tenant will not make such structural alterations in the premises as will change their character. If a dwelling-house is let and something which is not a dwelling-house is delivered up, the contract to deliver up in a tenant-like condition is broken."

Where the tenants holding under an oral tenancy from year to year removed the partition-wall, the fireplaces, staircase and windows in the building and turned the ground floor into one large shop and also made other structural alterations,

*Held,* that the tenants, having completely altered the character of the premises, were liable in damages for voluntary waste.

GREER *v.* DOWNS SUPPLY CO., (1927) 2 K. B. 28 : 96 L. J. K. B. 534 (C. A.).

*Principal and Agent—Sale of goods—Third party dealing with agent as principal—Set-off—Doctrine of constructive notice.*

The doctrine of constructive notice cannot be extended to commercial transactions. Thus if one party to a purely commercial transaction makes a contract with another in ignorance of the fact that the latter is an agent merely and in the honest belief that he is the principal, it is generally of no use to say he was negligent in entertaining his honest belief.

The respondent had sold goods to one *G* and had not been paid for them and was out of pocket to the extent of £17. *G* came to him and asked him if he might sell him some timber and the respondent hoping to get payment by means of a set-off and honestly believing that he was making a contract with *G* agreed to buy certain timber upon the terms that he should only pay the difference between the price of the timber and £17. The appellant sued for the value of goods sold and delivered.

*Held,* that the appellant was bound by the term as to set-off and that there was nothing to estop the respondent from relying on such a term.

*Manchester Trust* v. *Furness,* (1895) 2 Q B 539 applied.

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LEVENE *v.* INLAND REVENUE COMMISSIONERS, (1927) 2 K. B. 38 : 96 L J K B 457 (C. A.).

*Income-tax Act,* 1918 (8 *and* 9 *Geo.* 5, *c.* 40), *S.* 46—*Meaning of the expression "ordinarily resident"—British subject going abroad but spending part of the year in the United Kingdom—Liability for assessment to income-tax.*

Where a British subject living in the United Kingdom till the end of 1919 went abroad but continued to visit and stay in the United Kingdom for periods of about five months in every year and it also appeared that he had no fixed place of abode anywhere,

*Held,* affirming a judgment of Rowlatt, J., that he was a person "ordinarily resident" in the United Kingdom within the meaning of S. 46 of the Income-tax Act of 1918 and that he could be assessed to income-tax.

Per *Lord Hanworth, M. R.*—"To find residence it is not necessary to find a building or 'seat' as that word is sometimes

used. It must depend on questions of degree and of fact.... I suggest as a characteristic factor for consideration to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice....... Another fact may be found—if he returns and seeks his own fatherland in order to enjoy a sojourn in proximity to his relations and friends."

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LYSAGHT *v.* COMMISSIONERS OF INLAND REVENUE, (1927) 2 K. B. 55 : 96 L. J. K. B. 462 (C. A.).

*Income-tax Act,* 1918 (8 *and* 9 *Geo.* 5, *c.* 40), *S.* 46—*"Ordinarily resident"—Purely business visits—Homelife abroad—Finding as to residence, question of law.*

*L* who had changed his homelife from England to Ireland came over to England unaccompanied by his wife for short periods of a week in each month for purely business purposes. He had a small banking account in England and was a member of a London club.

*Held,* by the Court of Appeal (Lawrence, L. J. dissenting) reversing a judgment of Rowlatt, J., that *L* was not "ordinarily resident" within the United Kingdom and was not liable to be assessed to income-tax under the Income-tax Act of 1918.

Per *Lawrence, L. J.*—"The fact that the appellant (*L*) stays regularly in England for about three months of the year for the discharge of his duties as the servant of an English company in my opinion constitutes him a person who is both 'resident' and 'ordinarily resident' in the United Kingdom."

*Held* also that the meaning of residence in the Income-tax Act being a question of law the Court can review the result which the Commissioners had held to follow in law upon the facts found.

*Bater's Case,* (1922) 2 A C 1 followed.

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BRITISH AND NORTH EUROPEAN BANK, LTD. *v.* ZALZSTEIN, (1927) 2 K. B. 92 : 96 L. J. K. B. 539.

*Banker and customer—Book entries by bank manager—Customer relying on payment disregarding debit—Validity.*

"An entry in a pass book is not in all cases conclusive and binding on the bank or on the customer; each case must be judged on its particular facts, although the customer in whose

favour the entry stands starts with the advantage that *prima facie* it is an admission by the bank in his favour...... In every case where it is sought to treat a mere book entry as a payment some other circumstance must be present and relied upon to enable the customer in whose favour it is made to succeed, either some express previous authority to pay, or some communication of the making of the entry to the customer or some acting on it by him. There must be something in the nature both of a payment by one party and receipt by the other or some alteration in his position by the customer."

Where the manager of a bank made certain book entries for his own purpose to deceive the auditors and neither the bank nor the customer knew anything about the transaction and the customer never objected to the accounts as delivered to him but pleaded in a suit on the accounts that he was entitled to rely on the payment to his credit disregarding the debit :

*Held,* that there was no payment intended as such either by the bank manager or by the customer and that therefore the plea set up by the latter was unsustainable.

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WALLEMS REDERIJ A.|S. *v.* WM. H. MULLER & CO., BATAVIA, (1927) 2 K. B. 99.

*Shipping—Charterparty—Charterer's failure to load full cargo—Option of shipowner to load other cargo—Delay of voyage—Deviation.*

It is an implied term of every charter that if the charterer fails to fulfil his duty in shipping the cargo that he is bound to ship, the shipowner is at liberty to fill up the space in the ship which the charterer has left vacant if in doing so he is acting reasonably. The best test of the reasonableness of such action by the shipowner is, if to do so will diminish his pecuniary loss arising from the fault of the charterer and so diminish the damages that the charterer will be liable for. Consequently the shipowner has an implied liberty to delay the charter voyage by the period of time reasonably and necessarily occupied in taking in that substituted cargo and such delay does not amount to deviation so as to disentitle the shipowner from claiming damages in *lieu of dead freight.*

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LAWRENCE *v.* HAYES, (1927) 2 K. B. 111 : 96 L. J. K. B. 658.

*Practice—Set-off—Suit by assignee of debt—Debtor's claim to unliquidated damages against assignor—Merger of claim in judgment.*

The plaintiff claimed as assignee of one *L* instalments of a debt accrued due and payable by the defendant to *L*. The defendant admitted the debt but pleaded that he had a claim against *L* for unliquidated damages arising under the same contract as that under which his indebtedness to *L* arose and claimed to set it off against the plaintiff's claim. The plaintiff thereupon contended that the claim for unliquidated damages had merged in a judgment obtained by the defendant against *L* prior to the assignment and that the same was a bar to the plea of set-off.

*Held,* that the merger of the cause of action against the assignor in the judgment would operate only as between the parties to that cause of action and that it did not have the effect of depriving the defendant of his right to set up the plea of set-off and counter-claim as against the plaintiff.

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O'CEDAR, LTD. *v.* SLOUGH TRADING CO., (1927) 2 K. B. 123.

*Landlord and tenant—Grantor not to derogate from grant—Unilateral covenant.*

The principle that a grantor cannot derogate from his grant cannot be extended to apply to anything done by a lessor upon adjoining land which, while not affecting the demised premises or their user in any way merely renders it more expensive than it was before for the lessee to carry on his business on the demised premises.

*Held* also that the inclusion in the lease of the covenant by the lessees not to do anything on the demised premises which might make it more expensive for the adjoining premises does not give rise to an implied covenant on the part of the lessors not to use the adjoining premises so as to increase the burden on the demised premises.

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MORGAN *v.* LIVERPOOL CORPORATION, (1927) 2 K. B. 131 (C. A.).

*Landlord and tenant—Covenant for repair—Notice.*

Where there is a covenant on the part of the landlord to keep the premises in repair the tenant must give notice to the landlord of the latent as well as the patent defects, whether or not the landlord has the means of access. Where no such notice is given no responsibility attaches to the landlord in respect of the covenant for repair.

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THE KING *v.* GRAIN. *Ex parte* WANDSWORTH GUARDIANS, (1927) 2 K. B. 205 : 96 L. J. K. B. 563 (C. A.).

*Local Government—Surcharge and disallowance—Payment of gratuity—Superannuation allowance—Power of auditor to disallow and surcharge.*

In pursuance of certain circulars from the Minister of Health a Board of Guardians granted a gratuity to the Registrar of Births and Deaths. The auditor did not question it at the audit of accounts. The Guardians subsequently paid superannuation allowance to the Registrar on the same basis and the auditor disallowed the portion based on the gratuity. He also surcharged some of the Guardians under S. 32 of the Poor Law Amendment Act, 1884.

*Held,* affirming a decision of the Divisional Bench in (1927) 1 K. B. 540 that the payment having been sanctioned by the Government the auditor had not the power to discharge. The Court did not express any opinion on the other question whether there could be a surcharge only in cases of negligence or misconduct on the part of the person accounting.

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*In re* PAYNE. TAYLOR *v.* PAYNE, (1927) 2 Ch. 1: 96 L J. Ch. 291.

*Will—Construction—Residuary estate conveyed to sons with a gift over to their children—Son dying childless—Estate undisposed of.*

The testator by his will provided as follows:—"My trustees shall stand possessed of my residuary fund in trust to divide the same and the investments thereof into five equal shares and to appropriate one of such shares to each of my sons now living whether such son shall survive me or not, and so that any reference hereinafter contained to the shares of my respective sons in my residuary fund shall be deemed to apply and have reference to the shares hereinbefore directed to be appropriated to them respectively, whether they shall respectively survive me or not, provided always and I direct that the share so directed

to be appropriated to each of my said sons respectively shall not vest absolutely in them or in their representatives, but shall be retained by my trustees and held upon the trusts hereinafter mentioned." The testator further directed that the trustees should hold the residuary fund on certain trusts for their lives and that after the son's decease, or after the testator's decease in the case of sons predeceasing him, they should hold the respective share of the sons on trust for their children in equal shares. He also empowered his sons who survived him to revoke or alter the shares in which their children should divide the residuary estate. The testator died in 1917 leaving five sons, one of whom died issueless in 1926 after bequeathing his entire estate to his wife.

*Held,* that the share of residue directed to be appropriated to one of his sons who died without issue was undisposed of and that the same did not pass to the son's personal representative.

Rule in *Lassence* v. *Tierney,* (1 Mac & G. 551) and *Hancock* v. *Watson,* (1902) A. C. 14 held to be inapplicable.

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WILLIAMS *v.* BARTON, (1927) 2 Ch. 9 : 96 L J Ch. 355.

*Trust—Trustee making personal profit by using fiduciary position—Liability to account.*

The defendant was employed by a firm of stockbrokers. The terms of his employment were that on his side he was bound to give the firm his services in connection with the Bank of England transfer work; on the firm's side they were to pay him half the commission earned by the firm on all such work introduced by him to the firm as they were willing to carry out. The defendant was appointed one of the trustees of a will. When it became necessary to have the trust securities valued on the death of the testator and on a later occasion, the matter was entrusted to the firm of stockbrokers in which the defendant was employed and at his instigation. The defendant took no part in making the valuation or in fixing the fees but obtained one-half of such fees according to the terms of his employment. The co-trustee claimed that the money paid to the defendant must go to the trust estate.

*Held,* applying the principle that a trustee is not entitled to get any personal profit by availing himself of his position, that the defendant should treat the fees earned by him as part of the testator's estate. His duty as trustee and his interest in

an increased remuneration are in direct conflict; as trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers while as the recipient of half of the fees to be earned by the employer firm on work introduced by him his obvious interest is to choose or recommend them for the job.

*Bray* v. *Ford,* (1896) A. C. 44 applied.

*In re Cleveland's Settled Estates,* (1902) 2 Ch. 350 explained.

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LACTEOSOTE, LTD. *v.* ALBERMAN, (1927) 2 Ch. 117 : 96 L. J. Ch. 305.

*Trademark—Assignment of part of business—Infringement.*

A purchaser of a trademark becomes owner of it only if he becomes at the same time purchaser of the manufactory or the business concerned in the goods to which the mark has been affixed. Where a French manufacturer assigned his trademark in certain manufactured goods to the plaintiffs together with the goodwill of the business and the same was registered as a new trademark in England but the assignor continued to manufacture and sell goods under the old label which was similar to the new one and the defendant purchased the same in France and sold them in England :

*Held,* that the assignment was not in effect of the entire business carried on in France, that there was no infringement of the trademark of the assignee and that such a trademark being invalid in law must be expunged from the register of trademarks.

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SEYMOUR *v.* REED, (1927) A. C. 554.

*Income-tax—Professional cricketer—Payment of proceeds of benefit match—Personal gift or income—Income-tax Act,* 1918, *Sch. E, R.* 1.

A professional cricketer was employed by a club. The terms of his employment did not entitle him to a benefit but they provided that if a benefit were granted the club should have a voice in the application of the proceeds. A benefit match was held about the time the cricketer contemplated retirement and the net proceeds together with other sums obtained by public subscription were invested in certain securities and subsequently paid over to the cricketer. The question arose whether the proceeds of the match fell within the description

contained in R. 1 of Sch. E of "salaries, fees, wages, perquisites or profits" so as to be liable to income-tax under the Income-tax Act, 1918.

*Held,* by the House of Lords (Lord Atkinson dissenting) that the net proceeds of the benefit match should be regarded as a personal gift to the cricketer and not as income from his employment and that there was no liability to assessment to income-tax in respect of that amount.

*Per Lord Atkinson.*—"When no reason is shown for the gift to an official.... of the large and substantial prize given to him through the medium of a benefit match, it must in reason be assumed that it was given to him for the efficient and satisfactory discharge of the duties he was employed to discharge, and, if so, that the reward which accrued to him came to him from his employment."

Decision of the Court of Appeal in (1927) 1 K. B. 90 reversed; judgment of Rowlatt, J., in (1926) 1 K. B. 588 restored.

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McDowell *v.* Standard Oil Co., (1927) A. C. 632.

*Trademark—Registration—Similarity in name—Meaning of expression "calculated to deceive"—Trade Marks Act,* 1905, *S.* 11.

The appellant an oil merchant was desirous of registering the invented word '*Nuvol*' as a trademark in respect of lubricating oils. The respondents who had registered the invented word '*Nujol*' in respect of certain medicinal preparations objected on the ground that it was calculated to lead to confusion between the two kinds of goods sold. There was no evidence to show that the appellant had purposely adopted the proposed trademark with any dishonest intention. Besides the similarity in the names it appeared that the goods consisted of petroleum the only difference being in the degree of refinement. The Registrar refused registration.

*Held,* by the House of Lords affirming the decision of the Court of Appeal that there being risk of confusion registration of the trade name was rightly refused by the Registrar.

*Per Viscount Cave, L. C.*—It is quite clear that the words "calculated to deceive" which are found in S. 11 of the Trade Marks Act, 1905, do not mean "intended to deceive" but "likely (or reasonably likely) to deceive or mislead" the trade or the public...... The burden of proving that a proposed

trademark is not likely to deceive lies upon the applicant and.. ... if that proof is incomplete and the matter is *in dubio,* the application may be refused. I would add that registration under the Acts is a matter of discretion and the decision of the Registrar, though not conclusive, must carry considerable weight with the Court.

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SALVESEN OR VON LORANG *v.* ADMINISTRATOR OF AUSTRIAN PROPERTY, (1927) A. C. 641.

*Foreign judgment—Divorce proceeding—Law of domicil —Judgment* in rem.

The status of married persons as dependent on divorce apart from nullity proceedings is a matter for which the Court of their *domicil* is the appropriate Court and its decree is not only valid but conclusive. Such a judgment is a judgment *in rem* and is binding on the English and Scottish Courts unless it is proved to have been the result of fraud or collusion.

*Per Viscount Dunedin.*—"In order for a foreign decree to be immune from disturbance by an English (or Scottish) Court it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the Court is competent to deal, and it must not offend against English ideas of substantial justice."

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A. H. BULL & CO. *v.* W. AFRICAN SHIPPING AGENCY AND LIGHTERAGE CO., (1927) A. C. 686.

*Contract of hire—Hiring of lighter—Lighter-boys placed under control of hirers—Negligence—Loss of lighter—Action for damages—Maintainability.*

The appellants let on hire to the respondents a lighter. There was no written agreement of hiring but part of the agreement was that the lighter should be as usual manned by two lighter-boys, that is coloured labourers. These persons were from the moment of transfer out of the control of the appellants and subject to the orders and under the control of the respondents. Among the duties to be performed by them was the obedience to all orders regarding the attachment of the lighter to the steamship which was being loaded and it was also necessary that they or one of them should be on board to do what was required should the ropes be unable to stand the strain of the current. Three days after the transfer both the

labourers decamped during night and the barge having parted her moorings drifted with the current out of the harbour, ran ashore and broke up before she could be salved. In an action by the owners for damages for loss of the lighter:

*Held,* that the loss was due to the negligence of labourers who were at that time under the control of the hirers and that consequently the claim for damages by the owners should be allowed.

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## JOTTINGS AND CUTTINGS.

*Lord Haldane on the Judicial Committee.*—Lord Haldane's interest in the Judicial Committee, and his hopes for its future absorption of the judicial business of the House of Lords are well known. Some years ago—in 1922—he contributed a very interesting article on the subject to the *Cambridge Law Journal.* This month he addresses a larger public through the pages of the *Empire Review.* And he is not the only authority to expound the working of a tribunal which in the extent of its jurisdiction and the importance of its judgments is rivalled only by the Supreme Court of the United States. Lord Shaw has done the same; quite recently there have been the illuminating lectures by Professor J. H. Morgan, K. C., which were printed in these pages; and a few months ago we noticed Mr. Herbert Bentwich's article on "The Judicial Link of Empire" in the *English Review.* To take another example, Mr. Justice Duff, of the Supreme Court of Canada, in an Address printed in the *Canadian Bar Review* for June, 1925, recounted the great names which have adorned the Court of which, as a representative of the Dominion, he is now a member.

—*The Law Journal,* July 9, 1927, p. 23.

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*Great Privy Council Judges.*—It is interesting to compare the names given by Mr. Justice Duff in the Address just referred to with those which Lord Haldane mentions. Lord Lyndhurst, said to have had "the finest judicial intellect our race has produced"; Parkes and Willes, "each a living incarnation of the Common Law"; Lord Kingsdown, who, "according to the tradition of Downing Street, was three times offered the Lord Chancellorship, which he as often refused"; Jessel, who is said to have only once reserved a judgment—we believe it was twice—and never to have been reversed—the truth or pretty near it; Lord Cairns, "with hardly a peer in mastery of the

whole field of jurisprudence"; Lord Selborne, "whose name is always rightly coupled with that of Lord Cairns in judicial renown"; Westbury, "whom all men of his time counted a genius"; Watson and Macnaghten, "the Scotsman and the Scotch-Irishman, both possessed by the very genius itself of law and judicature". So far Mr. Justice Duff. And Lord Haldane, towards the end of his description of the Judicial Committee, says:

"It is only what one might expect to find that a tribunal with such varied duties, and working in such an atmosphere, should have produced at times great personalities. Looking back over the interval since it was given its present form by the Act of William IV, the list of the names of its Judges contains those of a succession of impressive personalities. Lyndhurst, Brougham, Cottenham, Kingsdown, Campbell, Westbury, Hatherley, Parke, Willes. Cairns, Selborne, Blackburn, Watson, Hobhouse, Herschell, Macnaghten, Davey, are among the names in that list."

Lord Haldane is less descriptive than Mr. Justice Duff, so he gets in more names, but substantially the lists are the same. They are lists of Privy Council Judges of the Victorian era who impressed greatly their contemporaries. They found sympathetic writers to pass on their names—writers such as Bagehot and Bryce and Atlay. Let us hope that the Judges of the present day will be as strikingly presented to posterity. But as to amalgamating the Judicial House of Lords with the Judicial Committee, we are not sure, though, in certain eventualities, it may be the only course.

—*The Law Journal*, July 9, 1927, p. 24.

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*Who is an Esquire?*—So far there is no legal or other authoritative definition of the meaning of the word. Sir Edward Coke thought that everybody who had the legal right to call himself a gentleman was an esquire and that a gentleman was the bearer of an inherited or acquired coat-of-arms; but nobody else has ventured upon a definition, although ten classes are mentioned by the writer of the article on "Esquire" in the *Encyclopaedia Britannica*. Sons of peers, according to black letter lawyers, are certainly esquires, and so are the eldest sons of younger sons of peers and their eldest sons in perpetuity; so also are the eldest sons of baronets and knights. And it is generally agreed that barristers, justices of the peace, mayors (while in office), persons holding a superior office under the Crown, and Attorneys in Colonies where the Attorney and counsel are one, of the select company.

—*The Law Journal*, July 9, 1927, p. 41.

*Learned Friends Fall Out.*—It must be a great while since any member of the English Bar called out a learned friend to an open-air engagement involving weapons for two and coffee for one ; and the duel between MM. Freaud and Cousin, both advocates who occasionally act as deputy judges, has aroused great interest amongst English lawyers. The quarrel began with words in Court, was continued in the precincts of the Court with fists, and ended in a duel with swords in a quiet spot in the neighbourhood of Paris. Report says that they fought with the utmost fury for six rounds ; at the end of which Maitre Freaud being slightly wounded in the arm the doctors forcibly stopped the fight, but were unable to end the feud.

Another forensic quarrel is reputed to have pursued a more novel or more civilised course; wherein a woman advocate sued a male colleague for the French equivalent of defamation in that he persisted in addressing and describing her as "Monsieur," presumably with the object of drawing unfavourable attention to her closely cropped head, her eye-glass and masculine cut and appearance of her clothing. In England the woman barrister is entitled to the designation of gentleman, but that is not quite the same thing. The innuendo, if any, in the Frenchwoman's claim would make interesting reading, but I have not seen it.

—*The Law Journal,* July 9, 1927, p. 41.

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*The Style of the L. C. J.*—Early this week, in the Lord Chief Justice's Court, a newly-appointed silk was defending with great skill and imperturbability a wicket which, from the batsman's point of view, had little merit. As part of his defence he put forward a proposition which appeared to shake not only the long row of junior counsel, robed and unrobed, but the rear ranks of solicitors and students. All craned forward to observe how the L. C. J. would take it.

He took it with judicial calm. He asked one or two questions to clear up certain ambiguities which appeared to lurk in the astounding proposition. So revised, he wrote it down in all its naked simplicity. Then he asked one final question, which began as follows:—"Assuming for the moment—and only for the moment—"

Phrases of this kind fall aptly and gratefully from the lips of the Lord Chief Justice and add distinction to his good law and sound judgments. Moreover, he possesses the rare faculty of

giving even to the worst of cases not only a patient, but a pointed hearing.

—*The Law Journal*, July 16, 1927, p. 61

*The Doctor must tell.*—The position of a medical man called upon in the witness box to disclose information acquired by him in the course of attendance upon a patient, to which we referred last week in connection with the recent debate of the Medico-Legal Society on the subject, came up in a concrete form at Birmingham Assizes last week, when a doctor from a hospital was subpoeanaed to produce documents showing the medical history of a man who had been treated at the hospital. As is well known, the Ministry of Health, working with local authorities, endeavour to persuade persons suffering from certain diseases to submit themselves to treatment by advertising in the plainest terms that treatment will be given under conditions of secrecy, and this undertaking is carried out, in some centres at any rate, by a system under which the applicant is allotted a number and the documents giving details of treatment, etc.; bear the number and not the name; so that the medical adviser is himself unaware of the patient's identity. Apparently the case in question was one of these but Mr. Justice McCardie held that this made no difference, nor did the fact that the witness producing the documents was not the doctor who had made the entries. As a matter of law there seems to be no sort of doubt that the learned Judge was right; but whether or not the law in this respect should be altered is another question. It would, of course, be difficult, if not impossible, if a change in the law were to be made, to limit it to cases in which hospitals or public clinics were concerned; that would be to discourage persons from consulting their own doctors and would tend to throw an additional burden on the State. The problem really is whether it is advisable in the interests of the health of the community to run the risk of a failure of justice in particular cases by excluding a certain class of evidence; there is much to be said for each view; and the matter is one that will, no doubt, engage the attention of Parliament before very long.

—*The Law Journal*, July 23, 1927, p. 65.

*The Lords' Appellate Jurisdiction.*—The current flood of proposals for the reform of the House of Lords contains no suggestion that its appellate jurisdiction as at present consti-

tuted should be altered or curtailed. This appellate jurisdiction is a very ancient and venerable thing. By 14 Ed. 3, c. 5, it was enacted that one prelate, two earls, and two barons should be entrusted with the King's Commission to hear by petition all complaints of delays or grievances in the Courts of King's Bench, Common Pleas and Exchequer; and by 27 Elizabeth, c. 8, a right of appeal to Parliament was given from the decisions of the Court of Exchequer Chamber.

The question of the original jurisdiction of the Lords was mightily discussed and finally abandoned in the seventeenth century ; and thereafter it continued peacefully to exercise its rights as a Court of Appeal. In Lord Eldon's days this appellate jurisdiction was fearfully and wonderfully exercised; for in effect the Lord Chancellor would sit with one lay and one spiritual peer, hastily impressed and both unknowing, and hear appeals from the Chancellor's own judgments.

—*The Law Journal,* July 23, 1927, p. 80.

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*When the House of Lords (H. L.) was abolished.*—Lord Hatherley's Bill, in 1872, for establishing one Supreme Imperial Court of Appeal, which should perform the duties of the House of Lords and sit continuously, was opposed by Lord Cairns, who greatly loved the "life peer" arrangement. But in 1873 Lord Hatherley's plan was in substance adopted in the Judicature Bill of that year, and the House of Lords awoke one fine morning to find that they had abolished themselves for judicial purposes. And so abolished they remained until Lord Cairns' Appellate Jurisdiction Act of 1876, which set the House of Lords once more upon its judicial legs, fortified by the assistance of the "Lords of Appeal in Ordinary". Since then it has lived peacefully and in good repute.

—*The Law Journal,* July 23, 1927, p. 80.

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*Kissing the Book.*—"O" in a recent forensic fable dealt with the strange case of the careful solicitor who provided the spermaceti candles, the white cockerel, the sacrificial knife, and other material which he deemed necessary for the appropriate swearing in of his Chinese witness. Less bloody, but hardly more rational must our native practice of "kissing the book" appear to the uninformed pagan traveller. It is curious that this part of the ceremony of oath-taking should have survived so long in England and Ireland. In Scotland the invocation of

the Deity with uplifted hand suffices. A similar practice obtains in France, Belgium and Austria. The Book is used in Spain and Italy in the cases of all witnesses, and for Jewish witnesses in Austria, but it is only taken in the hand. In Germany, apparently, they swear not at all. For some consciences in this country affirmation is of course enough; and all witnesses may avail themselves of the privilege conferred by the Oaths Act, 1888, or demand to be sworn in the form and manner in which the oath is usually administered in Scotland. Yet many witnesses, responding to the sharp command of the Clerk not only take the book in their right hand, and swear, but although it has been unnecessary since 1909, complete the ceremony by kissing the book with a distressing gusto, however uninviting the cover of the volume may be.

—*The Law Journal*, July 23, 1927, p. 80.

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*The Lord Chancellor's Double Role.*—Lord Cave, whose able interventions in the debates in the House of Lords have of late been frequent, is, if we may be permitted for a moment to exclude Lord Birkenhead, the mainstay of the Government in the Upper House. The idea of a political Lord Chancellor is of such long standing in England that one is apt to forget that the position of the Lord Chancellor is curiously anomalous. He may be, and has often been, the chief spokesman and the ablest member of his political party. At the same time he fills the highest and most influential judicial office in the State; and despite the accepted theory that the judiciary and the legislation should be independent, he alone of all the judges must hold the political views of the reigning Government. The holders of all other judicial offices of profit, Recorders and a few others only excepted, are rightly disqualified if they become even candidates for Parliament. There was a time, of course, when the Chancellor "had no law," and clergymen alone held the Great Seal. It was only after the Reformation, in 1538, that the lay and ennobled Chancellor was invented, and Lord Audley of Warden became the first of his class.

—*The Law Journal*, July 30, 1927, p. 81.

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*The Chancellor and the Lords.*—It is apt to be forgotten that the Chancellorship carries with it no obligation of ennoblement; and it is worth remembering, since the great majority of lawyers are financially unable to sustain the customary burdens

of a peerage, which also nowadays carries with it the disadvantage of partial political extinction. Lord Campbell, in his "Lives of the Chancellors," points out that the Woolsack is without the precincts of the House of Lords, and is, in fact, intended for the accommodation of a Chancellor who is not a peer. The proper seat for the peer-Chancellor is at the top of the Dukes' bench on the left of the Throne, and it is only in consequence of the convenience of its position that he sits upon the Woolsack. So Lord Cave, when he desires to address his fellow peers, takes his stand upon the floor of the House. The commoner-Chancellor would, of course, suffer some disadvantages. He would have neither vote nor voice in the House of Lords; and his duties would be confined to putting the question and communicating resolutions in accordance with the directions of the House. He could not take part in its judicial business. But on the fall of the Government he would be able to return to the more stirring arena of the House of Commons with his pension of £5,000 a year. And, while Chancellor, he would enjoy the privilege of trial as a peer for any felonious misconduct which he might be unusual enough to commit.

—*The Law Journal*, July 30, 1927, p. 82.

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*King's Bench Vacancies.*—The death of Mr. Justice Fraser and the impending retirement of Lord Justice Bankes mean a reduction in the number of King's Bench puisnes from seventeen to fifteen; since it is very improbable that the vacancy in the Court of Appeal will be filled direct from the Bar, as was done in the case of Fletcher-Moulton, L.J. The King's Bench appointments cannot be made in the ordinary way by His Majesty; for the Judges to be appointed will be the "two additional Judges" authorised by the Supreme Court of Judicature Act of 1910, and vacancies must be filled according to the provisions of S. 1 (2) of that Act, as now appearing in S. 11(1) (*a*) of the Consolidating Act of 1925. "Whenever the whole number of the puisne Judges attached to the King's Bench Division amounts to fifteen or upwards, a vacancy occurring among those Judges shall not be filled unless and until an address is presented to His Majesty from both Houses of Parliament representing that the state of business in that Division requires that the vacancy should be filled." There is no doubt that the state of King's Bench business does so require. It is a curious fact that recourse to Parliament would have been

unnecessary for filling the vacancy created by Mr. Justice Fraser's death, if the Bill of 1910 had been passed in its original form and so continued; for, prior to its amendment in Committee, the draft Bill required a Parliamentary address only when the number of the King's Bench Judges amounted to "upwards of fifteen".

—*The Law Journal*, July 30, 1927, p. 82.

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*"Right Honourables."*—One of those occasional points of etiquette that afford opportunity for individual Members of Parliament to distinguish themselves at question-time, arose on Monday when the Home Secretary was cross-examined about the right of sundry Lord Mayors to be addressed as "Right Honourable". Sir William Joynson-Hicks' reply seems to have been unassailable. He laid it down that the style or title "Right Honourable"

"like other titular distinctions, can only be conferred by grant from the Sovereign as the fountain of honour. The only Lord Mayors and Provosts in the United Kingdom who are entitled to be styled 'Right Honourable' are the Lord Mayors of London and York and the Lord Provost of Edinburgh, who have had the privilege from time immemorial, and the Lord Provost of Glasgow and the Lord Mayor of Belfast, on whom it has been conferred by grant in modern times."

There is a real danger, in these days, lest everything in the way of honours and distinctions shall become too common to be worth retaining at all, and the Home Secretary is to be commended for the stand he has made on this occasion. Incidentally, it is of interest to note what the Oxford Dictionary has to say of the titles "Hon." and "Right Hon." about which there is much misconception:

*Honorable*—Title (abbr. *Hon*) of children of Peers below rank of Marquess, Maids of Honour, Justices of High Court, Lords of Session, members of Government or Executive Councils in India and Colonies; *Most Hon*, title of Marquesses, Order of Bath and Privy Council; *Right Hon*, title of Peer below rank of Marquess, Privy Councillors and others.

—*The Law Journal*, July 30, 1927, p. 83

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## BOOK REVIEWS.

THE CODE OF CIVIL PROCEDURE WITH COMMENTARIES, by Dr. Nand Lal, B. A., LL. D., Advocate, Lahore. 1926. Published by the Lahore Law Journal. Price Rs. 25.

This is truly an encyclopædic work on the Law of Civil Procedure in this country in three volumes, the first volume

dealing with the sections of the Code, the second volume giving the commentaries on the first schedule and appendices from A to H and the third comprising Schedules II, III and IV, the Letters Patent of all the High Courts in British India, Rules framed by the several High Courts under S. 122 of the Code, the High Courts Act and the Government of India Act, Part IX, the Statement of Objects and Reasons, Reports of the Select Committee, table of cases and general index. The Code of Civil Procedure being an enactment in constant use throughout the country, several authoritative and valuable commentaries of the Act have appeared from time to time, some carrying the authority for their statements of law by the eminence and position of their authors, some noted for the lucidity and accuracy of the enunciation of principles and others serving as collections of the decided cases under appropriate headings which are very useful to a busy practitioner. This work being the latest in the field has combined in itself all the advantages to be derived from the earlier treatises and rightly claims to be an encyclopædia of all the learning on the Law of Civil Procedure. We do not think anybody has reason to complain of its bulk seeing the variety of matter contained in it and that no decision of any importance whether in the authorised reports or any important non-official legal journal has been omitted. Though some authors have omitted in their works reference to non-official journals and the decisions reported therein, we venture to think that they are necessarily incomplete as the authority of precedents, where their authority is recognised, does not rest on the discretion of the reporter of an official legal journal but on the tribunal making the pronouncements. We therefore agree with Dr. Nand Lal in thinking that the inclusion of decisions reported in non-official legal journals is essential for an exhaustive treatment of any branch of law and especially in the case of procedure which has sometimes to deal with complex and even novel situations. Seen from every point of view, the treatise under review is one of the most exhaustive and authoritative works and will shortly take its place among the foremost works on the subject.

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THE LAW OF COMPULSORY LAND ACQUISITION AND COMPENSATION, by S. G. Velinker, B. A., LL. B., Barrister-at-Law, assisted by N. G. Nadkarni and V. S. Velinker, second edition, 1927. Price Rs. 16.

We had occasion to review the first edition of this book in our pages and the necessity for the appearance of the second edition in less than two years is to our mind a sufficient indication of its usefulness. Since the publication of the first edition, the City of Bombay Improvements Trusts Act of 1898 has been repealed by the City of Bombay Improvements Trusts Act of 1925 which came into operation on the 31st March, 1926. The learned author has given a synopsis of its provisions and added it as an introduction to its commentary. The case-law which has come into existence since the last edition has been carefully noted and brought up-to-date. We have no doubt that this edition fully maintains the high level of its predecessor and the book will continue to be looked upon as a standard work on the Indian Law of Compulsory Land Acquisition and Compensation.

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THE DETECTION OF FORGERY, by P. Ramanatha Aiyar and N. S. Ranganatha Aiyar, Pleaders, Trichinopoly. Price Rs. 6.

This is one of the numerous publications useful to lawyers brought out by Mr. P. Ramanatha Aiyar who is well known as a writer on legal topics. This book furnishes a study in handwriting and collects all the useful information contained in well-known books on the subject which are not easily accessible to all lawyers, Judges and Magistrates, especially in the moffusil. It is easy to exaggerate the value of expert evidence relating to handwriting. It is, however, necessary to bear in mind in this connection what a well-known authority Dr. Lawson has to say in what is termed "expert evidence" : "The evidence of the genuineness of the signature based upon the comparison of handwriting and the opinion of experts is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a court, this is most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence." If this estimate of expert evidence is correct, we have no reason to regret that there are very few experts in this country. We venture to join issue with some observations in the foreword that a great many Indian lawyers are sadly deficient in their ability to weigh facts and forming a correct judgment on comparing testimony and appraising the

credibility of witnesses. It is somewhat remarkable that there underlies this statement an assumption that Englishmen whether lawyers or Judges mostly unacquainted with the customs and manners and even the languages of this country are better able to judge of the credibility of evidence adduced before them than Indian lawyers and judges who can enter into the motives of the people by their intimate knowledge of the conditions of their country. On the other hand, it is well known that European barristers do not succeed at the bar here, largely owing to their ignorance of the customs and manners and languages of this country. We also fail to see how a decision arrived at, as in England, by members of the jury who are drawn from the common multitude, can in any way be superior to the judgment on facts by persons who are trained for a lifetime in the sifting and appreciation of evidence. We venture to think these statements themselves sufficiently carry the refutation of the assumption. With all the limitations of a book dealing with facts and not law, we believe that this book will be found useful.

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A COMPARATIVE STUDY OF THE LAW OF INSOLVENCY IN BRITISH INDIA, by D. B. Kshirsagar, B. A., LL. B., Poona.

This is a book which gives a comparative study of the provisions of the Presidency Towns and Provincial Insolvency Acts, with explanatory commentaries under the sections. The commentaries are not burdened by references to case-law and consequently the book will be found useful to the student and the beginner in the profession.

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TRIAL OF MADELEINE SMITH. Edited by F. Tennyson Jesse. (Notable Trial Series). Published by Messrs. Butterworth & Co., Ltd. Price Rs. 6-8-0.

This is another of this interesting series. It maintains the finish and the interest of the previous numbers. We have no doubt that the legal practitioner will find in it much that is of interest and assistance to them. Of course, we are not among those who believe that these publications are or ought to interest the lay public because that interest is likely to be of a morbid and not of a healthy or desirable kind.

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THE

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## LAW REPORTING.*

ENGLISH REPORTS.—(*Contd.*)

In this Lecture I propose to deal with the history of Criminal Procedure in England which is an indispensable preliminary to a proper use of the Criminal Law Reports. In a way I have already touched upon some aspects of the question but it is desirable that the whole question should be considered at one place, and with certain amount of fulness.

The Assize of Clarendon, dated 1166, marks the beginning of the regular Criminal Procedure in England. It substituted for the old "hue and cry" a regular indictment or accusation before the King's Justices or Sheriff as the case may be by a Grand Jury of 12 men of the locality in cases of murder, theft and robbery. The Assize of Northampton added treation of the Court. Misdemeanors were mostly statutory offences. These two assizes marked off the graver class of offences called felonies from trespasses or misdemeanors as they came to be called later. Misdemeanor is described by Dr. Johnson as a kind of indefinite crime not capital but punishable at the discretion of the Court. Misdemeanors were mostly statutory offences At this stage, there was little that could be said to resemble a trial, the substantial part of the proceeding consisting mainly of the accusation by the Grand Jury. If the man was of bad fame, he was mutilated and set adrift without more and his chattels were forfeited to the Crown. The only sort of further trial allowed was the ordeal by water or fire. Even if the accused succeeded at the ordeal, he had to furnish security for good behaviour, if there was any flaw in his reputation. It is because the Grand Jury really took the place of witnesses that so much importance is attached in early procedure to venue about which we will speak at some length later. The procedure introduced by these assizes was the alternative for the

*The fifteenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Vakil, High Court.

direct method known as appeal for felony which, for a considerable time, occupied a very important place. The so-called appeal was only regulated vengeance and could hardly be called Criminal Procedure. A party who wanted to avail himself of this remedy had to present a minute and careful statement before the coroner accusing the offender and calling upon him to appear. If he failed to appear after five proclamations, he was outlawed. If he appeared and accepted the challenge, a battle would take place. If he was beaten, he was hanged straightaway; if he kept on fighting till the appearance of the stars, he was acquitted of the appeal. An acquittal, however, did not exempt him from prosecution by indictment. The advantage of appeal lay in this that in cases of larceny, the complainant could get restitution only by resorting to this method. On conviction on indictment the goods were forfeited to the Crown and the party was without remedy. This defect was set right by a Statute of 1529 which allowed restitution even in cases of conviction by indictment. The King's Judges generally encouraged indictment for two reasons, first because it was a source of revenue to the King as conviction involved forfeiture; secondly because it was a check on lawlessness which the other method involved. They accordingly suggested and allowed all sorts of technical loopholes for the accused proceeded against the other way. It was also laid down that the right of appeal was suspended during the visit of the King's Judges. Gradually, the procedure by appeal died out, the appeal for murder being the last to disappear. The three modes of trial known to English procedure at this time were waging law, battle and ordeal. By waging law is meant the getting a sufficient number of friends of the accused to swear to his innocence. This method was not available when the accused was caught red-handed or otherwise there was a *prima facie* case. Nor did it apply to cases of indictments. Battle went with appeal. Ordeal was the only mode of trial available in the case of indictments. This mode also disappeared when the Church abolished it in 1216. The Judges had recourse then, to the expedient of asking the accused whether he would submit to the trial by the country, *i. e.*, by the jury known later as Petty Jury to distinguish it from the other or Grand Jury. But till 1772 it was left to the option of the accused to agree to such a course. Sometimes they used to stand mute; the advantage of such a course being that their goods would not forfeit to the Crown. To mane them consent, judicial

torture used to be applied, such as starvation, pressing with weights, thumbscrew and so forth. In 1772 standing mute was declared by statute to be equivalent to conviction, but in 1827, it was enacted more in accordance with modern spirit that it amounted to a plea of not guilty. By the middle of the fourteenth century, trial by jury became an established feature of the English law. At this stage, accused were not allowed much liberty in their defence. They were not allowed even a copy of the indictment or a list of Crown's witnesses. They were not allowed to have counsel to defend them unless a point of law arose. It was doubtful if they could call witnesses and even if they could, the witnesses were not examined on oath. The argument used in support of this course was of the most curious kind—the prosecution was bound to prove the truth of the indictment. If it did not, the accused were entitled to an acquittal. If it did, it was no use to allow the accused to call witnesses. That would only be to encourage perjury. The only guarantee against reckless accusation and conviction for a long time was the approval of the Grand Jury, who were men of the locality. Even before them the accused were not permitted to cross-examine witnesses for the prosecution or summon their own witnesses in defence; a practice which continues to this day. A preliminary procedure of enquiry by justices was grafted upon the old procedure, but it was only the Act of 1848 that gave the accused the right to be present and to cross-examine witnesses at such enquiry. The right to call witnesses was conferred by the Act of 1867. By the same Act, to prevent groundless accusations, it was provided that an accused person can be arrested only on a sworn information or if he fails to attend on summons and provide for bail at the preliminary stage except in the case of heavy accusations, where a discretion is vested in the justices. One of the great abuses of early Criminal Procedure was the use of criminal information for the benefit of private plaintiffs. It was in law available only to the Crown in respect of its claims, but for adequate consideration one could have the use of it, as of many other things, by the connivance of officers of Courts. This was abolished by an Act of 1692. The first real reform of the abuse of illegal arrest and indeterminate-confinement which lay in the hands of King's Officers was effected by the passing of the Habeas Corpus Act of 1679. To start with, this writ was merely the incident of every criminal trial requiring the Sheriff

to produce the accused. In the 14th and 15th centuries it was used to protect the officials of Courts from arrest by rival Courts. A century later, it was used by the superior Courts to test the validity of imprisonment by their prerogative rivals or by executive authority generally. But the remedy resting as it did on several historical fictions was not felt adequate and in 1679 the statute above referred to was passed making it compulsory on the Judges of superior Courts to consider the application of every prisoner questioning the validity of his imprisonment.

Another private remedy capable of abuse was the right of preferring a bill of indictment before a Grand Jury possessed by every citizen at common law without any previous inquiry before justices into the truth of the accusation. Such accusations are known as voluntary bills. This right was not taken away by the Indictable Offences Act of 1848 which provided for preliminary inquiry before a justice in the case of ordinary indictments. The danger in them was that the Grand Jury heard only the prosecution and the accused was unrepresented before them.

Accordingly the legislature intervened and by the Vexatious Indictments Act of 1849 took away this right in many crimes, therein specified, such as perjury, indecent assault, libel, obtaining money by false pretences and several statutory misdemeanors. In all those cases now, a private party is not entitled to prefer a bill unless he has been bound over to prosecute or the accused is in custody or unless he has taken the consent in writing of one of the Judges of any of the superior Courts or of the Attorney-General or of the Solicitor-General. The first two contingencies can happen only on the party going before a justice. If the justice refuses to commit, the party may insist upon being allowed to go to the Grand Jury on his taking out a recognisance to give evidence or to prosecute.

Two other modes of initiating prosecution are the coroner's verdict which stands on the same footing as the finding of the Grand Jury though it is usual even in such cases to have a bill presented to the Grand Jury. Criminal information is occasionally resorted to in cases of misdemeanor before the King's Bench Division but it is available only to the Attorney-General or to the Master of the Crown's Office who is to be approached by private parties. Except in those petty cases governed by the summary jurisdiction Acts and the rare cases of information, all criminal trials in England are now preceded

by a twofold inquiry, one before the Justice of the Peace and another before the Grand Jury. A further safeguard against wrong conviction is provided by the unanimity of the jury which has been insisted upon from early times. This was of the greatest value to the accused when he had not the benefit of counsel or of the summoning of witnesses. All sorts of pressure used to be applied to secure unanimity among the jury. They were kept without food and fire till they came to an agreement. It was determined only in 1866 in the case of *Winson* v. *R.*, L. R. 1 Q. B. 289, that in any case of disagreement it was open to the Judge to discharge the jury and call a fresh jury. To secure strictly impartial men on the jury certain rights of challenge peremptorily and upon cause are allowed to the accused and the Crown. In the case of treason, the accused can challenge up to 35 without cause, in the case of felonies, up to 20. In the case of the Crown, the right is subject to there being enough people left to serve on the jury. On good cause, jurors can be challenged to any extent. Good cause is said to consist of 4 categories:

(*i*) *propter honoris respectum, i. e.*, on the ground that he is a peer.

(*ii*) *propter defectum, i. c.*, on the ground that he is a minor.

(*iii*) *propter offectum, i. e.*, on some presumed or actual partiality.

(*iv*) *propter delictum, i. e.*, on the ground of conviction for some crimes or misdemeanors affecting credit.

The challenge may be also for favour, *i. e.*; when there are reasonable grounds for suspicion that he will act under some prejudice or undue influence as when he has been entertained in the house of the party or is a fellow-servant, etc.

In 1695, a Treason Act was passed which provided that all persons prosecuted for treason should be provided with copies of the indictment five days, of the jury list two days before the trial, that they may be represented by counsel and may call witnesses who had to give evidence on oath. If the accused be too poor, it provided that the Court should assign two counsel of his own choice at public expense. It also provided that one might not be tried without the oath of at least two persons to support the specific kind of treason charged. This must be said to mark the beginning of civilised procedure in England. It was only in the reign of William IV that persons tried of felony were given the right to be defended by counsel.

It is a matter for comment that when this right was conferred on the accused, nearly all the Judges opposed the reform. In the case of misdemeanors, the accused had always the right to be defended by counsel. The Trials for Felonies Act (1836) gave the accused also the right to copies of depositions of witnesses, but it was only by the Indictments Act of 1915 that the accused became entitled to a copy of indictment in cases other than treason. In the case of murder and other grave crimes it was usual for the Court to ask some member of the bar present to give his honorary services to the prisoner. In 5 Cr. Ap. Reports 187, the Court of Criminal Appeal suggested that it might be done also in the case of rape and other offences of like nature. Now by the Poor Persons Defence Act (1903), 3 Ed. VII, c. 38, whenever it appears, having regard to the defence set up by any poor prisoner that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, the Committing Justices or the Judge of Assize or the Chairman of Quarter Sessions as the case may be, may certify that the prisoner ought to have legal aid and then the prisoner shall be entitled to legal aid at public expense. Under the rules made by the Attorney-General, every clerk of the Assize and clerk of the Peace keeps a list of solicitors and members of the Bar willing to undertake the defence of poor prisoners. The clerk is bound to enter in the list the names of all those that are willing. The name of any solicitor may be removed on the application of the solicitor or at the direction of any Judge of the Assize or the Chairman of the Quarter Sessions.

The indictment was originally an accusation presented by the Grand Jury upon their knowledge whereby some person was charged with crime. It is now drawn up by the solicitor for the prosecution. The bill is presented to the Grand Jury who hear witnesses for the prosecution, so many of them as they think necessary and if they are satisfied that a *prima facie* case is made out, they indorse upon the indictment the words 'true bill' '*billa vera*' as it used to be called in the days of bad Latin; if they are not so satisfied, they return a no true bill or *ignoramus*. Great strictness used to be observed in respect of these indictments and failure in respect of any formality used to lead to the defeating of the prosecution. This strictness was possibly a legacy from the 'appeal' procedure.

The history of indictments is a branch of the law of special pleading as applied to Criminal Law. The three parts of an

indictment are—the venue, the statement and the conclusion. The last has been rendered largely unnecessary by later legislation, but the other two parts remain important even to-day.

By venue is understood the local area over which the Commissioner or Judge has jurisdiction. The High Court has jurisdiction over offences wherever committed in England but the indictment is to be presented by the Grand Jury of the place and, before the Commissioners of Oyer and Terminer became a part of the High Court, the local jurisdiction of the Commission was limited to the area defined in the Commission. The Justice is commissioned to inquire with the assistance of the Grand Jury and to hear and to determine (Oyer and Terminer) with the assistance of the Petty jury and to have gaol delivery of prisoners under trial. In all these matters, the jurisdiction was determined by the terms of the Commission. This necessity to be presented by the Grand Jury of the place was carried so far that, in some instances, an accused went scot free. For instance, if a man was stabbed in one county and he died in another, the jury of neither place could present and the man could not be convicted of murder. Again, if a thief stole in one county and took the goods into another and the goods were received by somebody there, the receiver escaped as he could not be indicted in either county. The principal's county could not take cognizance of the receipt and the accessory's county could not take cognizance of the principal's offence. If the place was unknown, as, for instance, in the case of forgery, the accusation could not be presented at all. Special statutes were passed from time to time fixing the venue in such cases. To provide for the case of thieves travelling from place to place, the doctrine was invented that the theft continued so long the thief continued in possession of the goods. Where a fair trial could not be expected in the ordinary venue, the King's Bench had power to change the venue.

The statement portion was expected to set out all the ingredients of the offence, *viz.*, the material facts and circumstances and the intent that constitute the offence. These matters had to be set forth with certainty and without repugnancy and the accused must be directly and positively charged with having committed the offence. The name of the accused had to be given with his rank, occupation and residence, so also the name of the party injured and of the owner of the property stolen if known, if not known, that fact had to be noted. Every material fact which formed an ingredient in the offence had to be alleged

to have been done at a particular place and time. There are 3 degrees of certainty according to Coke: (1) certainty to a certain intent in every particular, (2) certainty to a certain extent in general, (3) certainty to a common intent. It is the second kind of intent that was required in respect of indictments: Statements had to be set out verbatim and chattels had to be described correctly. There were also certain customary ways in which certain things had to be described. If those descriptions were not given, the indictment failed. For instance, money had to be described as so many pieces of the current gold and so forth. If a man was charged with stealing sheep and it was proved that he stole dead sheep, the charge failed. Boot was the word and shoe could not be substituted for it. Averments had to be proved as laid. If a man was indicted for the murder of James Smith and it turned out that his name was John Smith, the prosecution would fail. In the case of murder, it was necessary to set out all minute details, *e. g.,* if a man was stabled, how he was stabled, where and when and so forth. If the indictment said that he was stabbed with the knife in the left hand and the evidence was that he was stabbed with the knife in the right hand the prosecution failed. Thus it became necessary to charge alternative counts in order to provide for every possible contingency. This led to interminable length in these indictments. In forgery the person defrauded had to be mentioned. Perjury, theft by false pretences and many other offences required very intricate indictments. In no one count was it allowed to charge for more than one offence, but the same indictment might contain any number of offences subject to this that a felony and a misdemeanor could not be combined. In the case of felonies, the Courts laid down early a rule of election, viz., that, if felonies in disconnected transactions were combined, the prosecutor should select one transaction to which he should confine his evidence. Misdemeanors were not subject to the rule of election. As I have said before the Court had no power to amend the indictment and any variance however trivial led to a defeating of the prosecution. In spite of the wide loophole provided thus, the accused laboured under great disability in that they were not able to get a copy of the indictment and whatever defect there was, they had to discover it while the indictment was being read out to them, and in this they had not till recently even the assistance of counsel. The Criminal Procedure Act of 1848, the Quarter Sessions Act, 1849, and the Criminal Procedure Act have, on the one hand, simplified indictments and on the other have conferred certain

powers on the Court to amend the indictments. By reason of its piecemeal nature and the very wide knowledge of the rules of pleading that it assumed, the reform was of very doubtful value. The subject is now governed by the Indictments Act, 1915, which confers on the Court very wide powers of amendment. By that Act, a rule committee is set up for making rules as to the framing of indictments. The subject has been simplified beyond recognition. You have an interesting discussion as to the survival in English Criminal Law of the old technicalities relating to repugnancy of record and its consequences in *I. G Singleton* v. *The King-Emperor* (1).

As to practice also, the Criminal Procedure Act of 1865 has assimilated the practice in criminal cases to that of civil in several particulars. But it was not till 1898 that the evidence of the accused and their husbands or wives became admissible in criminal cases. The accused and their husbands and wives cannot be called even under this Act except upon the application of the accused, and the fact that accused has not volunteered testimony may not be commented upon by the prosecution though apparently there is nothing to prevent the Court making the comment.

At common law, the Crown neither pays nor receives costs, and all provisions as to costs in criminal cases are statutory. There were some partial provisions in statutes, from time to time. Now a statute of 1908, 8 Ed VII, c. 15, deals comprehensively with the subject and provides for the costs of unsuccessful prosecution or defence. The cost is first paid out of public funds and then recovered from the party directed to pay. Under the Crown Office Rules, pauper procedure is made applicable to criminal proceedings as well.

The old English Law knew but one punishment, the capital for all major offences. The barbarity of these sentences was assuaged by a series of Acts connected with Peel (1827-1832) and the final touch was given by 7 William IV and 1 Vic., c. 1, which abolished death sentence in a large number of cases. Towards the end of the 17th century, the practice of transporting to colonies came into vogue, but this could at first be done only at the choice of the accused but power was given to the Judges by a statute of 1717 to pass a sentence of transportation in lieu of capital sentence. When the colonies were closed for transportation, penal sevitude was made to serve for transportation. Various improvements have been effected in accordance with modern development of scientific cri-

1. (1924) 29 C W N 260.

minology by the Children's Act (1908), Prevention of Crimes Act, 1908, and Probation of Offenders Act, 1907. In the case of children death sentence is abolished and in the case of non-capital offences various alternatives are provided. A child (under 14 years) could not be sentenced to imprisonment or penal servitude either as a substantive punishment or in default of payment of fine, etc. Nor can a person between the age of 14 and 16 unless he is of such an unruly character that he cannot be detained in any place of detention provided for children and young persons or of such a depraved character that he is not a fit person to be detained. He may be committed to the care of a relative or other fit person named by the Court; he may be placed under the supervision of probation officers; he may be sent to a reformatory or an industrial school. Instead of other punishments, the Court may simply direct whipping. Young men between 16 and 21 may be sent to Borstal Institutions. There are also special provisions made as to defectives, *i. e.*, idiots, imbeciles, feeble-minded persons, and a new category, moral imbeciles, *i. e.*, persons who display from early age permanent mental defect coupled with strong vicious or criminal propensities on which punishment has no effect. The Court is also given power to postpone sentence requiring the convicted person to enter into recognisances with or without sureties in all cases punishable with imprisonment, if the Court is of opinion that, having regard to the character, antecedents, age, health and mental condition of the person charged or to the trivial nature of the offence or to the extenuating circumstances under which the offence is committed, such a course is justified. It may in such cases also order payment of compensation. Again, in the case of children and young persons the Court may impose a fine on them instead of other punishments: it may also impose a fine on the guardian. A statute of 1827 conferred power on the Court to add a sentence of solitary confinement to hard labour but this was taken away by 56 and 57 Vic., c. 54. Whipping was one of the ordinary common law punishments for misdemeanor. In 1820, it was made illegal to whip females, and by the Criminal Justice Administration Act no person can now be sentenced to be whipped otherwise than under a statutory enactment. The general power of whipping for felonies given by 7 and 8 Geo. IV, c. 28, was taken away by 51 and 52 Vic., c. 57. At common law a fine was rarely if ever imposed for treason or felony but in the case of mis-

demeanor the Court might impose a fine as a part or whole of a sentence. The only restriction is that imposed by *Magna Carta* against excessive and unreasonable fines. Forfeiture on convictions for treason and felony has been abolished by the Forfeiture Act of 1870.

It was a characteristic feature of the old English Criminal Procedure that it admitted of no appeal properly so called, either upon matters of fact or upon matters of law though there were a certain number of proceedings which partook of the nature of an appeal. There was first the writ of error which was however available only when there was some irregularity apparent on the face of the record. This did not mean much, for the record gave very little information. The only document connected with a trial which had to be in writing was the indictment upon which the officer of the Court makes certain memorandum showing the plea of the prisoner and the verdict of the jury. He also used to keep a minute book in Court in which the names of jurors, abstract of indictments, the memorandum of pleas, verdicts and sentences used to be entered. This was a private memorandum book having no legal authority, but that was the only record kept of criminal cases. If ever it became necessary "to make up the record" it became the foundation of the history of the proceedings set out with pedantic, and useless detail. The record so made up in cases of felony would state "the session of Oyer and Terminer, the commission of the Judges, the presentment by oath of the Grand Jurors by name, the indictment, the process to bring in the offender, the delivery of the indictment into Court, the arrangement of the pleas, the issue, the verdict of the jury, the asking the prisoner why sentence should not be passed on him, and the judgment. The record, it will be found, contained no information as to either evidence or as to the directions given to the jury. The only errors that could be assigned were thus in respect of defects in indictments, sentence or issue or impanelment of jury and naturally it was not a very hopeful kind of process for the accused. Till the third year of Anne, these writs were issued entirely out of favour and were the means by which conviction was set aside when the Crown was so minded. In that year the Court held that in cases of misdemeanor writs ought to be granted as a matter of justice and if the Attorney-General refused to grant his fiat they would direct him to do so if there were good grounds for doing. If granted they would not be contented with the Attorney-General's

admission but would judicially determine the question. In cases of felony and treason, the issue of the writ was always a matter of favour granted on the fiat of the Attorney-General which used to be issued when an arguable point arose and the Court decided the question judicially.

Another method was by motion for a new trial which was available in cases of misdemeanor. In cases where questions of difficulty were apprehended to arise application used to be made to the King's Bench to remove the case to be tried by itself or at the Assizes on the *Nisi Prius* or Civil Side. When a case was so tried, a new trial might be moved on the ground of misdirection, or on the ground that the verdict was against evidence or on any other ground on which new trials could be moved for in civil cases. In *Queen* v. *Scaife*(2) in a case of felony tried before the assizes a similar order was made without argument but the Privy Council declined to follow the precedent as being an unwarranted innovation. Another of the methods was by resort to the Court for Crown Cases reserved. The practice for the Judges was when any point of unusual difficulty arose to reserve the point for the consideration of the other Judges, respiting the execution of the sentence or postponing judgment. The point reserved would be argued before Judges by counsel not in Court but at Sergeant's Inn, of which all the Judges were members. If they thought the ruling was wrong, the accused received a free pardon. This applied only to the Judges of the superior courts. So far as the Quarter Sessions was concerned, no such remedy was open. In 1848 the informal tribunal above referred to was erected into a Court called the Court for Crown Cases reserved consisting of all the Judges, five of them including the Lord Chief Justice forming a quorum. If they differed the matter was referred to the whole body. Under this Act any Judge or Chairman or recorder of a Quarter Sessions might also state a case for the opinion of the Court but it was left to his absolute discretion to do so or not. This Act did not apply to cases removed by *certiorari* and tried before the King's Bench or the Assizes on the *Nisi Prius* or Civil Side. The Judicature Act did not interfere with the procedure. It was provided that no appeal lay from a judgment so arrived at. It also provided that in other cases also, no appeal lay from the Judges in any criminal cause or matter save for some error of law apparent on the face of record. Now a

2. (1852) 18 Q B 773 : 118 E R 292.

comprehensive statute dealing with criminal appeals has been passed in 1907 which has instituted a Court of Criminal Appeal to hear appeals. From the decision of the Court of Criminal Appeal no appeal lies unless the Director of Public Prosecution or the Prosecutor or the defendant obtains the certificate of the Attorney-General that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. Under the former practice no appeal lay to the House of Lords from the Court of the Crown Cases reserved but an appeal lay to the Court of Appeal and the House of Lords from the judgments of the High Court in any criminal matter where error of law appeared on the record.

Appeals lie to the Court of Criminal Appeal in the following cases:

(*i*) From a conviction on an indictment on a point of law.

(*ii*) With the leave of the Court of Criminal Appeal or upon certificate by the trying Judge that it is a fit case for appeal against his conviction on any question of fact, or mixed question of law and fact or any other ground which appears to the Court to be a sufficient ground.

(*iii*) With leave of the Court of Appeal from any sentence. There is no appeal from acquittal. Writs of error and motions for new trial also are abolished by this Act. The Act is made applicable to convictions on crimial information and coroner's inquisitions and also to cases in which a man is dealt with under the Vagrancy Act as an incorrigible rogue. The jurisdiction under the Crown Cases Act is also transferred to this Court.

The Court has to allow the appeal if it is of opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or the judgment of the Court should be set aside on the ground of any error of law or that on any ground there was a miscarriage of justice. The Court may, notwithstanding that there was an error, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. The following are some of the points that usually form the subject of discussion in the Court of Appeal. Defects in indictment are points of law for this purpose but encouragement is not given to such objections unless there is actually a miscarriage of Justice in conse-

quence. Wrongful admission of evidence is a good ground for appeal unless the evidence could not reasonably be said to have affected the minds of the jury in arriving at their verdict. Wrongful exclusion of evidence is a ground for setting aside conviction unless the verdict would in all probability have been the same even if the evidence was admitted. Absence of corroboration to accomplice's evidence is considered a good ground for quashing conviction. Misdirection on a point of law is of course a good ground, but misdirection on evidence can be objected to only on leave. If there is misdirection, the conviction will be quashed unless the prosecution can show that even on a right direction the jury would have come to the same conclusion. When it is urged that the verdict is against the weight of evidence, it is necessary to show that the verdict is unreasonable. If the argument is that there was no evidence to go to the jury, a distinction is made between cases where the objection is taken before the defence is entered and where it is taken after the case is over. In the former case, the defence evidence will not be taken account of though it may fill up the gap in the prosecution. This is however doubted. The general grounds of appeal provided for in the Act relate to defects in the constitution of the jury, misconduct of the jury, unfair trial and so forth.

The special pleas that generally occur in criminal trials are four: *Autrefois acquit, Autrefois convict, Autrefois attaint* and pardon, viz., previous acquittal, previous conviction, attainder and pardon. The basis of the first two pleas is the common law rule that a man may not be put twice in peril of the same offence and not any rule of estoppel. A previous acquittal is a bar (*i*) where the acquittal is for the exact offence, (*ii*) where it was in respect of the same act or offence and there is some statute that says that he should not be tried or punished again on the same facts. The first branch applies not only to the same offence but also to such offences of which he could have been properly convicted on the first indictment, for instance an acquittal on a charge of murder is a bar for a subsequent indictment for manslaughter. Attainder for felony and treason has been abolished in 1870 and in effect the plea of attaint according to which a person once attainted of treason or felony could not be indicted for another felony has become obsolete. The theory on which this plea proceeded was that attainder was equivalent to death in the eye of the law and a fresh prosecution in the circumstances was meaningless.

*Veneri de novo* is the power of summoning a fresh jury which took place in two cases (1) before completion of the trial if the Judge thought fit to discharge the first, (2) where a special verdict has been returned on which the Appellate Court could not enter judgment or where there has been irregularity in the trial amounting to a mis-trial, *e. g.*, cases of defect of jurisdiction in respect of time, place and person or of imperfectly worded or ambiguous or inconsistent verdicts. (3) By a Court of error in cases of mis-trial of treason, felony or misdemeanor. (4) By the Court of Crown Cases reserved when the Court refused to accept the right verdict and on a misdirection, a wrong verdict was accepted, or where the verdict was against evidence.

The Criminal Appeals Act does not affect the discretionary power of Judges of discharging the jury nor does it seem to affect the inherent power of the Appellate Court to direct it in proper cases.

In *Rex* v. *Ball* (3), a question arose as to what is to happen if the House of Lords reverses the judgment of the Court of Appeal acquitting the accused and the Court came to the conclusion that the result was that the conviction was restored and effect was to be given to it by correcting the record, expunging the judgment of acquittal, and by the accused being arrested and made to submit to the sentence.

In this connection, we may also consider a few of the well-known writs largely resorted to in criminal cases although their scope is not restricted to criminal cases. These are the writs of prohibition and *certiorari*.

The writ of *quo warranto* was a writ of criminal nature once but now it is a purely civil one. The writ of prohibition is a prerogative writ issuing out of the High Court of Justice and directed to an inferior Court, which forbids such Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It might be peremptory or it might be *quousque, i. e.*, until the Lower Court alters its decision. The writ though not of course is of right and not discretionary and the superior court cannot refuse to grant the writ on the ground of the smallness of the matter in dispute or delay on the part of the applicant. The writ cannot be claimed of right unless the defect of jurisdiction is clear but it will not be granted if the defect can be cured by an amendment. If the objection to jurisdiction is upon the face of the record, it may be taken at any time, even after judgment. If the point of juris-

3. L R (1911) A C 47.

diction depends on some fact within the knowledge of the applicant the Court will interfere only in exceptional cases after judgment. Prohibition will be granted when the Court on an error of law has given itself jurisdiction but if it has acted upon a wrong decision of facts on conflicting evidence, the Court does not usually interfere. This writ is not raised to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits.

*Certiorari* issues out of a superior court and is directed to the Judge or other officer of an inferior Court of record requiring that the record of the proceedings should be transmitted to the superior Court to be there dealt with. Indictments are removed from the assizes and from the central criminal court by a writ in the nature of *certiorari* for those Courts are now branches of the High Court itself. In addition to removing indictments to the High Court for trial or for judgment in the case of special verdicts, *certiorari* also lies for questioning the proceedings of inferior Courts or judicial bodies. It is not used for removing after acquittal unless the acquittal is on appeal before an inferior tribunal. It is used to quash orders other than judgments on indictments, or to quash indictments before trial. At common law the sentence of any Criminal Court of inferior jurisdiction can be removed into High Court in aid of the defective coercive powers of the Lower Courts. This power of superintending, supervising, aiding or controlling of the High Court is held to give it the right of protecting also the lower Courts against publications which are likely to prejudice fair trial, and the High Court has power to punish such offences as contempts summarily.

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## CORRESPONDENCE.

To

THE EDITOR,

MADRAS LAW JOURNAL.

### "VAKALATS AND CRIMINAL COURTS".

THERE is a good deal of obscurity as to the authority for the practice of Pleaders filing Vakalatnamas in Criminal Courts. Both the Criminal Procedure Code and the Criminal Rules of Practice do not contain any clear rulings as to what form criminal court vakalats should bear and when vakalats are to be presented before a criminal court. The form usually employed, however, for a vakalat is Form No. 121 of the Civil Rules of Practice and curiously enough it goes unchallenged. The Judge of the Criminal Court is satisfied if the vakalat is

duly attested by the village munsif or the municipal councillor and if in place of the words "plaintiff and defendant" the words "petitioner and counter-petitioner" or "complainant and the accused" are used. Strictly speaking, the form of vakalat prescribed by the Civil Rules of Practice has to be amended in several material particulars before it can suit the exigencies of criminal courts.

The usual practice is for a vakalat being filed by only the pleader for the complainant or the petitioner; though according to Item 10, Sch. II of the Madras Act No. V of 1922 a vakalatnama presented before any criminal court other than a High Court should bear a court-fee stamp of one rupee, it is no where laid down in the Criminal Procedure Code or the Criminal Rules of Practice that a pleader for the complainant or the petitioner should file a vakalat with a court-fee of one rupee. The pleader for the accused accoding to R. 141 of the Criminal Rules of Practice and G. O. No. 918, dated the 16th June, 1910, files only a memorandum of appearance which need not bear any court-fee stamp as in the case of a vakalat. The said R. 141 has the clause "Whenever a pleader........ does not file in court a vakalat from his client" but no where has it been definitely mentioned in the said Criminal Rules of Practice as to when a vakalat has to be filed in court by a pleader. Why should not the procedure with regard to vakalats be expressly and clearly laid down?

According to Ss. 205 and 540-A of the Criminal Procedure Code, the personal attendance of the accused under certain circumstances may be dispensed with by a magistrate and the accused might be permitted to appear by his pleader. But would this permission require the filing of what is ordinarily called a special vakalat? There is no mention of special vakalat or any particular form it should conform to in the said sections of the Criminal Procedure Code or anywhere in the Criminal Rules of Practice. And yet magistrates of criminal courts insist on the pleaders for the accused filing special vakalats when permitting the accused to appear by their pleaders. What is the authority for insistence on a special vakalat, evidently a creature of the unwritten law? If a magistrate hears a criminal case in the absence of the accused, it is a serious illegality vitiating trial and the defect cannot be cured even by S. 537, Criminal Procedure Code. This difficulty has been rightly tided

over by Ss. 205 and 540-A, Criminal Procedure Code, and yet what for is the costly insistence of a special vakalat? Various magistrates impose various restrictions as to the filing of special vakalat in one and the same case. If two or more accused in a case are permitted to appear by their pleader only one special vakalat for them all is enough in the opinion of some magistrates, while others insist on as many special vakalats as there are accused in a case whose absence is to be permitted. If at all special vakalats are sanctioned by the law of the land, why should it not definitely lay down somewhere the procedure thereof instead of leaving it to be determined by the sweet will and pleasure of individual magistrates? According to a ruling in *Emperor* v. *Mussamat Jamul Khatun* (1) S. 205, Criminal Procedure Code, allows the accused to appear by pleader and "such appearance involves the performance of all acts which devolve upon the accused in the course of the trial such as answering the examination by the Court under S. 342 or pleading or refusing to plead to the charge under S. 255". Such being the clear decision, if at all a special vakalat in addition to a memo. of appearance is deemed necessary, the legislature should prescribe a form in consonance with the spirit of the decision *supra* and do away with the present anomalous form of vakalat

Some magistrates insist on the pleaders for the accused filing, in addition to a memo., a special vakalat to enable them to obtain public copies of the documents, depositions etc., of the case. This again is unsupported by any section or ruling in the adjective law of crimes.

I hope and trust that in the interests of the litigant public and the legal practitioners of the moffusil criminal courts, the authorities will be pleased to so amend the Criminal Rules of Practice as to lay down expressly and clearly some rulings regarding the filing of vakalats and obviate the anomalies noted above.

(Signed) G. Satyanarayana Murti, M. A.,
First Grade Pleader and Secretary,
Bar Association, Parlakimedi

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1. (1912) 6 S L R 206 : 19 I C 544 : 14 Cr. L J 272.

# SUMMARY OF ENGLISH CASES.

*In re* MONK : GIFFEN *v.* WEDD, 96 L. J. Ch. 296 (C. A.).

*Will—Construction—General charitable intention—Partial application of surplus fund—Residue to be applied cypres and not passing to next-of-kin.*

A testator after bequeathing a life interest in his estate to his widow gave certain legacies and conveyed the residuary estate to certain charity trustees and directed them to set apart a certain amount for establishing a 'coal fund', the income to be used for the purchase of coal to be distributed among the poor inhabitants of a parish and the balance to be utilised for making loans to the poor inhabitants of the same parish on certain terms. It appeared that there might be a surplus after making the necessary loans.

*Held*, reversing a judgment of Tomlin, J., that there was an immediate and effective gift of the whole of the residue for the charity and that the surplus income could be applied *cypres,* the same not having passed to the next-of-kin.

*Per Lawrence, L. J.*—"There is nothing in law to prevent a testator, if so minded, from setting up a permanent charity, snch as the one here, and from endowing it with a fund sufficiently large to afford relief not only to the present, but also to the future, objects of his bounty...... The testator is the sole judge as to the amount he desires to devote to the object he had in view, and it is not the function of the Court to inquire whether the testator has over-estimated the amount required to carry out his scheme, or whether it is likely or not that, within a reasonable time, so large an amount will be required for that purpose. In order to constitute a partial failure of a charitable trust the next-of-kin would have to prove that it was impossible that the whole sum would ever be required for the purposes of the trust."

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MCFARLANE *v.* HUTTON BROTHERS (STEVEDORES), LTD., 96 L. J. K. B. 357 (C. A.).

*Workmen's compensation—Accident as the result of internal causes—Workman suffering from heart disease—Sudden death during work—Claim for compensation—Maintainability.*

A workman was employed as a stevedore in the afterhold of a ship. He was a regular man, able to do his work but it

appeared he was suffering from a disease of the arteries of the heart. One day while engaged along with others in unloading some iron ore he felt ill because of a heart attack and within half an hour thereafter died. In an action by the widow for compensation,

*Held,* that the personal injury was caused to the workman by accident, that it arose out of and in the course of employment and that consequently compensation should be awarded to the plaintiff.

*Per Lord Hanworthy, M. R.*—"A man may suffer an accident and be entitled to recover in respect of the injury caused by the accident within the meaning of the Workmen's Compensation Act although the strain which sets up and puts in motion the cause of his death may arise in the ordinary exercise of his work which he is employed to do and is not of a special or momentary character."

Observations of Lord Macnaghten in *Clover, Clayton & Co. v. Hughes,* (1910) A. C. 242, relied on.

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MITCHELL *v.* B. W. NOBLE, LTD., 96 L. J. K. B. 484 (C. A.).

*Income-tax—Directors of Company holding office for life —Misconduct of director—Payment of compensation to procure retirement—Business expense or capital expenditure—Income-tax Act,* 1918, *Sch. D, Rules applicable to cases I and II, R.* 3.

The Directors of a private company who held office for life considered it necessary for the sake of the good name of the company to get rid of a director who was guilty of misconduct and consequently entered into an agreement with him by which it was agreed that the shares in his name should be assigned to the other directors who were to pay him a large sum as compensation to ensure his retirement. The question arose whether such payment was a deductible item of expenditure or capital payment for purposes of income-tax.

*Held,* affirming a decision of Rowlatt, J., that the disbursement was "wholly and exclusively paid out or expended for the purposes of the trade" within the meaning of R. 3 of the Rules applicable to cases I and II of Schedule D of the Income-tax Act, 1918, and that the same was a deductible item of expenditure and not a capital payment for purposes of assessment to income-tax.

ROBERTS *v.* ANGLO-SAXON INSURANCE ASSOCIATION, 96 L. J. K. B. 590 (C. A.).

*Insurance—Motor car—"Warranted used only for commercial travelling"—Accident while carrying passengers—Liability of insurers—Award—Error of law as a ground for setting aside.*

A motor car insurance policy contained in the schedule particulars of the car followed by these words: "Warranted used only for the following purposes: commercial travelling". The insured car caught fire and was destroyed while engaged in carrying passengers. In a claim on the policy the arbitrator awarded compensation.

*Held,* by the Court of Appeal, that the loss having occurred while the car was not being used for the purpose of commercial travelling the insurance company was not liable under the policy.

*Held,* also that there was an error of law appearing on the face of the award in that the arbitrator had stated a wrong construction of the policy and that consequently the award must be set aside.

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IN RE. ROPNER SHIPPING CO. AND CLEVES COLLIERIES, 96 L. J. K. B. 654 (C. A.).

*Shipping—Charterparty—Demurrage—Ship withdrawn by owners for bunkering during demurrage period—Effect.*

In order that demurrage may be claimed by the shipowners they must at least do nothing to prevent the vessel from being available and at the disposal of the charterers for the purpose of completing the loading of the cargo; where demurrage having begun to run and while the cargo had not been entirely loaded, the ship-owners, for their own convenience, shifted the position of the vessel from a position where it was adapted to receive cargo, to a point where it was adapted only to receive the bunker coal and proceeded during a number of days to bunker the vessel rendering it impossible for the charterers to continue the loading of the cargo during that period.

*Held,* that the charterers were not liable for demurrage for the period from the time the bunkering commenced until it was finished irrespective of whether the ship was actually utilised for that purpose during the whole time.

BLATCHFORD *v.* STADDON AND FOUNDS, 96 L. J. K. B. 608 (H. L.).

*Workmen's Compensation Act,* 1906, *S.* 8—*Industrial disease—Liability of last employer.*

S. 8 of the Workmen's Compensation Act, provides that where a workman is suffering from an industrial disease and thereby disabled from earning full wages and the disease is due to the nature of the employment in which the workman was employed at any time within twelve months prior to the date of the disablement he shall be entitled to compensation. It also provided that the disease was to be deemed to be due to the nature of the employment unless the certifying surgeon certified or the employer proved the contrary.

The appellant who contracted lead poisoning during his service in the navy worked as a painter from 1920 to 1924 under three persons successively. Seven months after he left off his last employer's service owing to illness he was certified to be suffering from lead poisoning and being unable to earn his wages he sued the respondent his last employer for compenstation.

*Held,* reversing a decision of the Court of Appeal, that the workman was entitled to recover compensation from his last employer by virtue of S. 8 of the Workmen's Compensation Act.

*Per Lord Atkinson*:— "It was not necessary for the workman to prove that it was the employment with the last employer which in fact caused his disablement or suspension. It will be sufficient for him to prove that his work with his last employer during the twelve months immediately preceding his disablement was of the same nature and character as the work to which his disease was due."

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LORDEN *v.* BROOKE-HITCHING, (1927) 2 K. B. 237 : 96 L. J. K. B. 400.

*Landlord and Tenant—Covenant not to use premises for certain purposes—Use of premises for restaurant—Breach of covenant.*

One of the covenants in a lease enumerated various trades which were not to be carried on on the demised premises during the term without the permission of the lessor, among those trades being those of ale-house-keeper, beer-house-keeper, tavern-keeper and licensed victualler. The covenant also

provided that the tenant should not carry on any trade or business which should be dangerous or annoying to the owner of the premises or the occupiers in the neighbourhood.

*Held*, that the use of the premises as a restaurant with a beer and wine on license did not amount to a breach of the covenant.

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JEBARA *v.* OTTOMAN BANK, (1927) 2 K. B. 254 (C. A.): 96 L. J. K. B. 581.

*Contract—Executory contract—Effect of outbreak of war—Delivery of goods to enemy during war-time—Price of goods paid after war—Risks of exchange, who should bear—Agency of necessity—Treaty of Lausanne, Art. 84.*

J, a British subject resident in Manchester, was in the habit of procuring Manchester goods for certain Turkish firms residing in Beyrout, then part of the Turkish Empire. He paid for the goods to the Manchester merchants, drew at sight for the price on the Turkish firms, attached to the bills the bills of lading for the godds and financed himself by obtaining an advance on the documentary bill from the Ottoman Bank whose head-quarters were in Turkey through its branch at Manchester. The latter would then forward the bill to the Beyrout branch who would surrender the documents against payment by the Turkish merchants. The bank having collected used to give *J* a cheque in sterling for the amount of the bill less advances and commissions, the bank and not *J* taking the risks of exchange. Just before the outbreak of the war *J* sent certain goods to Beyrout and though they arrived at the latter place before the war the consignees took delivery and paid the price on the bills only during the war in terms of Turkish currency. At the end of the war the bank proposed to pay *J* sterling for the Turkish currency at the then rate of exchange. *J* sued the bank for wrongful dealing with goods and bills received before the war.

*Held*, that the original contract between the parties being executory the effect of the war was to dissolve the contract and absolve the parties from further performance of it and that the bank was liable in damages for the wrongful handing over of the goods as a conversion.

*Held* also that their conduct could not be justified either on the ground of agency of necessity or under Art. 84 of the Treaty of Lausanne.

Doctrine of agency of necessity discussed by Scrutton, L.J.

RADCLIFFE *v.* BUCKWELL, (1927) 2 K. B. 273.

*Shipping—Loading of cargo—Regulation as to load line—Breach of, during course of voyage—Offence—Merchant Shipping Act,* 1894, *S.* 442 (1).

S. 442 (1) of the Merchant Shipping Act, 1894, makes it an offence on the part of the master of a ship to "allow the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load line". A British ship was loaded with cargo in Finland during fine weather, the centre of the disc not being submerged at the time. Subsequently, however, during the course of the voyage to England the ship went deep and the centre of the disc got submerged owing to sea and rain water getting in.

*Held,* that the master of the ship was guilty of an offence under S. 442 (1) of the Act.

*Per Lord Hewart, C. J.*—"It is the duty of a reasonably careful master in all the circumstances to take into consideration at the time of actual loading the likelihood of bad weather and its probable effect on a heavy deck cargo."

*Per Shearman, J.*—"In my judgment the master of a ship allows her to be so loaded as to submerge the centre of the disc whenever he allows an act of loading which may reasonably be expected to cause that submersion at any time during the voyage and in fact does so."

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IMPORTERS COMPANY, LTD. *v.* WESTMINISTER BANK, LTD., (1927) 2 K. B. 297 (C. A.).

*Banker and customer—Banker receiving payment on behalf of another Bank—Customer Bank subsequently proved to have no title—Liability of banker—Negligence—Bills of Exchange Act,* 1882, *S.* 82.

S. 82 of the Bills of Exchange Act, 1882, provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque.... and the customer has no title.... the banker shall not incur liability to the true owner of the cheque for having received such payment." The onus of bringing a banker within the exception rests with that person and he has to show that he in good faith and without negligence received payment for a customer of a crossed cheque.

It is impossible that a very close and accurate survey of all the circumstances can be expected from the clearing banker who has to go through a very large volume of work.

The appellants drew cheques in favour of the foreign sellers to them of goods and sent the cheques over to their own agent S with instructions to hand the cheques to the foreign sellers. *S* stole the cheques, forged the endorsements and paid the cheques into his own account in the German Bank; and when the cheques came forward they were collected by the respondents for the German Bank.

*Held,* that the respondents were entitled to plead S. 82 of the Bills of Exchange Act in defence, and that they had been collecting moneys for a customer and were not holders for value.

*Held* also that if a non-clearing bank regularly employs a clearing bank to clear its cheques the non-clearing bank becomes the "customer" of the clearing bank.

Decision in (1927) 1 K. B. 869 affirmed.

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JAMES *v.* BRITISH GENERAL INSURANCE CO., (1927) 2 K. B. 311.

*Insurance—Motor car collision—Criminal conduct of insured—Negligence—Liability for damages and costs of repairs—Right to indemnity—Public policy.*

Under a policy of insurance underwritten by the defendants the plaintiff was insured in connection with his ownership and driving of a 'Fiat' motor car against a variety of matters including what are known as third party risks of public liability. During the currency of the policy while the plaintiff was driving the insured car a collision took place between it and a motor bicycle as a result of which one passenger was killed and another injured. The plaintiff, who was proved to have been drunk at the time of the accident, besides paying for the repairs to the vehicles and damages to the injured, was convicted of manslaughter and sentenced to imprisonment. The plaintiff brought the action under the insurance policy to recover indemnity in respect of the above mentioned expenses and costs. The defence was raised that the plaintiff was guilty of a crime in respect of the accident and that consequently it was against public policy that he should be indemnified.

*Held,* that the plaintiff was entitled to recover the money under the policy of insurance.

*Per Roche, J.*—The circumstances in which public policy is applicable are subject to variation..... The act which brought about the civil and criminal responsibilities in this case was the result of gross or reckless negligence and was not done wilfully or advertently. In such cnrcumstances there is not on the part of the person, who does the act, that degree of criminality which in the doing of a known unlawful act makes it against public policy that the perpetrator should be indemnified in respect of it.

Decision of Bailhache, J., in *Tinline* v. *White Cross Insurance,* (1921) 3 K. B. 327, followed.

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## JOTTINGS AND CUTTINGS.

*The Law Officers and the Glittering Prizes.*—When these judicial vacancies occur, it must always be a matter of some anxiety for the law officers to know whether to take or to reject the appointment. Sir Douglas Hogg, of course, has before him a clear vista with the Woolsack at the end; and another vista opens up from the place where he now is, to even higher, if less remunerative, honours.

When Brougham was offered the position of Chief Baron of the Exchequer, he rightly refused it. "It is only *one stage* from the Woolsack", said the Premier when making the offer. "Yes," said Brougham, "but the *horses will then be off.*" He also refused the Mastership of the Rolls, but Sir John Leach accepted it; and it was Leach whose judgments were as swift as Lord Eldon's in the Court of Chancery were slow. Whence came the observation that the Rolls Court was the Court of *Terminer sans oyer*, and Eldon's the Court of *Oyer sans terminer.*

—*The Law Journal*, July, 30, 1927, p. 100.

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*The Undoing of an Attorney-General.*—One of the saddest tales in legal history relates to Sir William Horne, referred to in Prof. Courtney Kenny's "What an Old Reporter Told Me", in the *Law Quarterly*. After a brilliant career at the Bar, his title was clear from the Attorney-Generalship to an equally distinguished future on the Bench. Yet he sank to a mere Mastership in Chancery, where he had to prepare and draw up the decrees of Judges who had been his juniors at the Bar

and should have been his inferiors on the Bench. Small wonder that he cursed, or that his epithets, faithfully taken down, were unreadable in Court.

Conscience, Campbell, and Brougham, severally or collectively, were the causes of this distressing *descensus averni.* Horne had been Attorney-General for about a year. Campbell, the Soliditor-General, greatly desired the Attorney-Generalship. Brougham, the Lord Chancellor, because Horne made a poor showing in the House of Commons, began to scheme for his removal to a more congenial sphere. Thus beset on both sides, Horne was offered a judgeship as Baron of the Exchequer. But he had conscientious scruples against pronouncing sentence of death and, therefore, could not go on circuit or sit in a criminal court. He had a conversation with the Lord Chancellor and came away with the strong impression that things would be so remodelled and rearranged that he would not have to perform these distasteful duties. So he resigned; and thereafter Brougham and Campbell protested, perhaps too much, that no such arrangement had ever been made.

—*The Law Journal,* July 30, 1927, p. 100.

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*For Preferment's Sake.*—Mr. Craig's story of Lord Lyndhurst affords an example of how others kept their conscience well in hand, lest it might mar their fortunes. For Lyndhurst, when Mr. (and later Sergeant) Copley, was an ardent Radical. And it is reported that when the Sergeant was making his masterly speech in the Watson trial, Lord Castlereagh was in Court and heard him. "What a pity", his Lordship wrote on a slip of paper, "that your principles prevent your advancement!" "They don't", wrote Copley, with great promptitude, on the same slip. And it is a matter of history that they didn't.

Lord Chancellor King, in earlier times, furnished another example. Whiston, sadly observing that King had been brought up among dissenters at Exeter, "under a most religious, Christian and learned education", says he fell into a dispute with him one day on the question as to whether it was justifiable to subscribe to articles of faith which one did not believe, for preferment. "Which," says Whiston, "he openly justified, and pleaded for it, that we must not lose our usefulness for scruples". But he admitted he wouldn't allow of such prevarication in Court. "And suppose God Almighty

should behave so in the next world, where are we then?" asked the dismayed Whiston. There was no answer.

—*The Law Journal,* July 30, 1927, p. 100.

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*Lord Birkenhead on the Law.*—The list of Lord Birkenhead's literary output is growing. We have had the *Points of View,* the *Contemporary Personalities,* and the *Fourteen English Judges,* and now in two volumes we have *Law Life and Letters.* We shall not attempt to deal with them in any detail this week, but there are chapters bearing on the administration of the law and on professional matters which will be of great interest to lawyers, and *Milestones of My Life,* in the second volume, will appeal also to a wider circle. In the chapter on *Law and the Public,* in the first volume, Lord Birkenhead lets us into the secret that when he was Lord Chancellor he urged on the Coalition Government the need of Circuit reform. But local political influence was against him. "The task of a Lord Chancellor is very hard when he has all the politicians against him, the majority of the lawyers, and only a minority tepidly with him". If Lord Birkenhead, who put the Law of Property Act through by sheer dæmonic energy, could not shake the archaic circuit system, the case is pretty hopeless. And Lord Birkenhead who, it may be guessed, got "surprising fees" in his time, thinks that the practice of running after fashionable leaders is a mistake. If he became involved in litigation he would select "a competent and industrious lawyer", who would not leave the Court from the moment his case began until the moment it ended. Lord Birkenhead thinks that clients have to thank themselves for the excessive cost of litigation. And the result of a careful consideration of "fusion" is that the fundamental principle must be the advantage of the public, but that while the Bar could hardly resist a unanimous demand by solicitors for equality—needless to say, no such demand now exists—yet the advocate or trial lawyers will always flourish, and the suitable maxim is *Quieta non movere.* We may add that the advocate is only one type of specialist, though it may be the type with which Lord Birkenhead is most familiar.

—*The Law Journal,* October 1, 1927, p. 206.

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*The value of Juries:*—Lord Hewart has been expressing his views also on the use of juries. This was to representatives of the Press at Manchester, who attempted to get his opinion about Mr. Pickles' proposal for professional jurymen. We

gather that Lord Hewart was shy of dealing with the matter unless it was brought forward as the deliberate proposal of the Law Society and of that there is no prospect; but he gave a very laudatory account of the value of juries as now constituted. He quoted Lord Sterndale as saying that juries as juries were never wrong, and Lord Hewart represented this as a serious statement, meaning, however, not that the conclusion of facts was never open to correction, but that on the facts as put before the jury, the conclusion reached corresponded strictly with the weight of the evidence. This, no doubt requires modification, but Lord Birkenhead, in his recent book, "Law, Life, and Politics", speaks in the same strain. "I cannot remember", he says (I, 255), "in the thousands of cases which I supposes I must have argued before juries, more than three in which I was absolutely certain that the juries were completely wrong". And he considers that what twelve ordinary men think of the facts is, on the whole, more likely to be right than a very highly instructed legal functionary. And yet it is well known that juries are more easily swayed by oratorical effort than the highly instructed legal functionary—that is, a Judge—and we imagine that there are not a few cases on record where juries have given surprising verdicts. Still, the views of the late Lord Sterndale, of Lord Birkenhead, and of Lord Hewart, strongly approve what is, perhaps, our most characteristic English institution. In Italy, we notice, there is a prospect of the jury being abolished. Juries have, it seems, shown a certain amount of independence. Of course. That is what they are for.

—*The Law Journal*, October 8, 1927, p. 227.

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*The Husband's Lost Right to Chastise*:—An unfortunate husband who in a police court recently declared in self-defence that he thought he had the right to beat his wife, if he did not hit her too hard was rather out of date than erroneous in his law. For in Mathew Bacon's "New Abridgement of the Law," to which the industrious student still flies for fundamental legal truths, the law is thus stated: "The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in such case if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by suing a writ of 'supplicavit'

out of Chancery; or may apply to the Spiritual Court for a divorce 'propter sævitiam' ".

A hopeful member of the Bar once cited this before the late Lard Halsbury. "Such quaint and absurd dicta", said he, " as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not now capable of being cited as authorities in this or any civilised country". And a dictum of Grantham, J., in a later case, that "it would have served her right if her husband had boxed her ears, for her conduct was enough to drive any man out of his mind", has not been followed or approved.

—*The Law Journal*, October 8, 1927, p. 246.

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*The Pay of a Lord Justice of Appeal*:—The vacancy in the Court of Appeal has not only aroused speculation as to the person upon whom the Prime Minister's choice will fall for the succession, but renewed wonder as to why a Lord Justice should receive no more remuneration than an ordinary *puisne*. When an ex-pupil offered his congratulations to Sir A. L. Smith on his elevation to the Court of Appeal, the promoted one succinctly replied, "No more wages, you 'know'". The responsibility for this state of things rests with a bye-gone generation, foolish and perverse, who deliberately preferred the honour to lucre. When the office was first created, those who were about to be appointed were offered two alternatives—an extra 500*l*. a year or membership of the Privy Council, and in an unguarded moment they selected the Privy Council. Whereof succeeding generations of appellant Judges have been duly sworn and have no doubt wished their predecessors had made a wiser choice.

The rash resolve of the original Lords Justices was sustained in S. 13 of the Judicature Act, of 1873 which allotted to "each of the ordinary Judges of the Court of Appeal and to each of the other Judges of the High Court of Justice, the sum of five thousand pounds a year"———a provision which was duly transferred to and incorporated in the latest Act.

—*The Law Journal*, October 8, 1927, p. 246.

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## BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS ACT, by Messrs. K. Bhashyam and Adiga. Published by Messrs. Butterworth & Co., 1927. Price Rs. 12-8-0.

Messrs. Bhashyam and Adiga's work on the Law of Negotiable Instruments in India has already taken the fore-

most place among the commentaries on the Act. The subject being one of a growing interest, the appearance of this edition, though after a short interval of the last work, has to be welcomed. There have been only two amendments of the Act since the publication of the last edition and they have been duly noticed in the body of the book. One of the most important decisions on the subject given by the Privy Council from the High Court of Calcutta in *M. A. Sassoon & Sons, Ltd.* v. *International Banking Corporation* is more than of interest to India and has therefore appeared also in the English Law Reports, 1927 A. C. 711. But that decision appeared after the printing of the work under review and could not therefore be noticed in the body of the work. When the problems of currency in this country and measures calculated to popularise banking and to increase the facilities for the same are being considered, it is only appropriate that the learned authors should have thought to bring out the present edition on a closely allied branch of the law. It is needless to add that the case-law has been brought up to date and the notes have been in some places re-written with reference to the latest exposition of law. We believe the volume under review fully maintains the high standard set up by the previous edition of the work.

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THE LAW OF CHITTIES, by A. M. Mathew, Vakil, Quilon. Price Rs. 4.

The law relating to chit funds has in recent years come up very frequently before the Madras High Court and chit transactions are so common in Malabar, Travancore and Cochin that it was thought fit to enact the law on the subject in Travancore and the matter is engaging the attention of the Cochin Government. Even in Madras the need for legislation has been felt. On a matter of such interest where there are numerous decisions of the Travancore High Court and the Cochin Chief Court, and also of the Madras High Court, we think the learned author was justified in bringing out this small work setting forth clearly the principles of the law relating to chit transactions and examining the decisions under the various heads. The work consists of two parts, the first dealing with the principles of the law on the subject and the decisions on the same, and the second part gives the Travancore Chitties Regulations of Travancore with a commentary thereon. The appendices which are eight in number give all the allied information and practical hints.

We therefore welcome this publication and believe that it will be found useful for the clear understanding of the law relating to the chit transactions.

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A MANUAL OF LAW TERMS AND PHRASES, by Mr. K. Jagadisa Aiyar, B. A., 1st Grade Pleader, Ponneri. Published by the Eastern Law House, Calcutta, 1927. Price Rs. 5.

This publication collects the terms and phrases of Indian and English law and expressions used in commercial and revenue law and arranges them alphabetically giving definitions and explanations adequate for their understanding in use. In some instances references are given to statutes and to standard works. Even as it is, the work is likely to be found of great use. Its usefulness would have been considerably enhanced if the definitions had been taken from the judicial expositions of the same in most cases and references had been given to the decisions themselves on the plan adopted in Strouds' Judicial Dictionary. The expositions of the author would then derive greater authority by such references to decisions. We are aware that the labour involved in producing a work of this character would be very great and the author would be placing the legal profession under a deep debt of gratitude if he added this feature to the work. The appendices to the work give foreign legal words and maxims with their meanings. We have no doubt that the work will be found useful to students and lawyers, judges, magistrates and revenue officials.

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THE TRIAL OF GANGARAM AND SEW PRASAD. Edited by the Hon'ble Mr. Justice Page of the High Court of Calcutta and assisted by Mr. B. M. Sen, Barrister-at-Law. Published by Messrs. Thacker, Spink & Co., 1927.

The publication of Notable Trials is of considerable value from the point of view of the lawyer and layman alike. Several works of this kind of English trials have appeared in the Notable Trials Series. There have been many trials in this country which have aroused considerable interest not merely from the sensational point of view but from the point of view of the lawyer and Judge. We wish that more numerous publications of this kind appear in the future and it is a matter for sincere gratification that the Hon'ble Mr. Justice Page found time to edit this work in the midst of his onerous duties and indeed there can be none more competent to edit it.

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## THE LIMITS OF THE DOCTRINE OF TRACING.

THE doctrine of tracing is of great antiquity in English Law though it has progressed and attained a considerable degree of refinement only in more modern times. The doctrine itself has a two-fold aspect and can be stated thus: "If a trustee has, in breach of trust, converted trust money into some other form, the property into which it has been so converted becomes subject to the trust . . . . Any gain accrues to the trust estate and any loss falls on the trustee. Secondly, if a trustee has mixed trust moneys with his own, or has, partly with his own and partly with trust moneys, purchased other property, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property so purchased. If however, the mixed fund can be traced (into whatever form it may have been converted) the beneficiaries will be entitled to a first charge on it". (Underhill's Law of Trusts and Trustees, 8th Edition, p. 481). The guiding principle is that a trustee cannot assert a title of his own to trust property. In the words of Lord Ellenborough in *Taylor* v. *Plumer* (1) "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with them". The doctrine cannot obviously apply where the trustee destroys a trust fund by dissipating it altogether, for, in that case there remains nothing to be the subject of a trust and the remedy is to proceed against the trustee personally. But, where there is property in the hands of a trustee into which it can be shown that the trust fund has gone, the *cestui que trust* can assert a lien over the entire property. In other words if once it be shown that a trust fund has gone into a business, the means of ascertainment fail only when it can be shown that the trust fund has been destroyed or dissipated.

1. (1815) 3 M & S 562 : 105 E R 721.

In early times the doctrine was freely applied to the case of factors. Thus it was held that goods entrusted to a factor could be recovered by the principal on the insolvency of the factor without his ranking as a creditor. But a difficulty was experienced in tracing the principal's fund where it consisted of money. It was held in a number of cases [See *Whitecomb* v. *Jacob* (2), *Ryall* v. *Rolle* (3), *Ex Parte Dumas* (4), *Scott* v. *Surman*(5) and *Ex Parte Sayers*(6)] that money could not be followed, in the way that goods could be, because money had no earmark, and that if the trust fund was in the form of money at the time of bankruptcy the principal could only rank with the other creditors. But early enough a distinction was drawn between money kept in a bag and separate from other moneys of the trustee and money mixed and confounded with that of the trustee. It was held that in the former case alone could the *cestui que trust* trace and recover the money. Thus in *Tooke* v. *Hollingworth* (7) Kenyon, C. J., said: "If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay, if goods be sold and reduced into money, provided that money be in separate bags and distinguishable from the factor's other property, the law is the same."

Similarly in the well-known case of *Taylor* v. *Plumer* (1) Lord Ellenborough, C. J., observed: "If the property in its original state or form was covered with a trust, no change in that form can divest it of such trust. It makes no difference in reason or law into what form the change may have been made . . . The right only ceases when the means of ascertainment fail." He added that the means would fail in a case "where the subject is turned into money and mixed and confounded with the general mass of the same description." Sir George Jessel, M. R., pointed out in *Hallett's case* (8) that the statement of the law in the passage extracted above was correct but that the statement of fact in the last clause was incorrect and

1. (1815) 3 M & S 562 : 105 E R 721.
2. (1742) 1 Salk. 161 : 91 E R 149.
3. (1749) 1 Atk. 165 : 26 E R 107 4. (1754) 1 Atk. 232 : 26 E R 149.
5. (1742) Willes 400 : 125 E R 1235.
6. (1800) 5 Ves. 169 : 31 E R 528.
7. (1793) 5 T R 215 : 101 E R 121. 8. (1880) 13 Ch. D 696.

attributed the error to the fact that that eminent Judge's knowledge of the rules of equity was not quite commensurate with the knowledge of the rules of common law. But the real truth is that the doctrine had attained a degree of refinement by the time *Hallett's case* (8) was decided which it had not during the time of *Taylor* v. *Plumer* (1).

What a strong hold the old view that money had no ear-mark and consequently could not be followed unless kept separate had on lawyers' minds may be seen from the fact that a great equity Judge like Justice Fry considered it to be too well established to be disturbed. In *Ex parte Dale & Co.* (9), the bankers were authorised to collect a sum of money and send it on to their employer. Instead of doing so they entered it into their general account. It was held by Fry, J., that the doctrine of following was inapplicable because the money was not kept separate. A relic of this old view is found in the judgment of Lopes, L. J., in *In re Hallett & Co.: Ex-parte Blane* (10). He observes "if trust money can be traced, it is liable to be followed by the trustee in bankruptcy, but if it has been mixed up with other money so as not to be distinguishable it cannot be followed . . . The money was not ear-marked and cannot be identified".

But this process of sitting on the fence could not continue for long, because of the obvious difficulty of following money by reason of its character of being currency. A departure from the old view was for the first time made in the case of *Pennel* v. *Deffel* (11). There Lord Justice Knight Bruce supposes the case of a trust fund kept separate and then refers to the case of a trust fund mingled with money belonging to the trustee. Then he says : "But not in either case would the blending together of the trust money, however confusedly, be of any moment as between various *cestui que trustent* on the one hand, and the executors representing the general creditors on the other." In another famous passage the same Judge observes: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have

1. (1815) 3 M & S 562: 105 E R 721. 8 (1880) L R 13 Ch. D 696.
9. (1879) L R 11 Ch. D 772. 10. L R (1894) 2 Q B 237.
11. (1953) 4 De G M & G 372 : 43 E R 551.

done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestui que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on the one hand and the trust on the other". To the same effect Lord Justice Turner observes thus in the same case: "It is an undoubted principle of this court that between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust". *Pennel* v. *Deffel* (11) has not attained the celebrity which the judgment of the Master of the Rolls in *Hallett's case* (8) has. But it was in that case that the doctrine was stated and applied in its extended form. And the very judgment of Sir George Jessel, M. R., in *Hallett's case* (8) is merely an elaborate discussion why that case rather than the judgment of Fry, J., in *Ex-parte Dale & Co.* (9) should be followed.

One more case may be referred to at this stage and that is *Frith* v. *Cartland* (12). There Vice-Chancellor Wood approved of *Pennel* v. *Deffel* (11) and said: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole of it will be treated as the trust property, except so far as he may be able to distinguish what is his own. The sole question is whether the property can or cannot be identified."

Now we come to the case of *In re Hallett's Estate* : *Knatchbull* v. *Hallett* (8). There it was laid down that the doctrine of tracing was applicable to all persons who held funds under a fiduciary relationship. But the more important principle therein laid down was that equity could follow trust money even if put into a bank or undistinguishable mass. The

8. (1880) L R 13 Ch. D 696. 9. (1879) L R 11 Ch. D 772.
11. (1853) 4 De. G M & G 372 : 43 E R 551.
12. (1865) 2 H & M 417 : 71 E R 525.

agent had in breach of his duty paid the money of his principal into his bank so that it formed part of a general debt due to him on current account with the bankers. It was held that the indebtedness was for a single sum of which the amount of the principal's money formed an integral part. The loan to the banker was regarded as an investment *pro tanto* of the principal's money and the latter was treated as entitled to waive the breach of duty by his agent and to claim the investment to the extent of the amount due to him. The agent could not set up any part of the money in the bank was his until he had made good his breach of duty and in that sense there was a charge. *Hallett's case* (8) is memorable because of this valuable remedy it gave the *cestui que trust,* namely, to claim a charge on the mixed assets.

Thus in the words of Sir George Jessel by a "gradual refinement of the doctrine of equity" the point where exactly the means of ascertainment fail has been pushed back and the remedy which began as one *in personam* became a right to property, and in this connection the decision of the House of Lords in *Sinclair* v. *Brougham* (13) calls for more than a passing notice. It was not a case of fiduciary relationship. A building society contrary to its objects of association began to increase its deposits and do banking business. When it went into liquidation it was found that there remained a sum of money over and above the amount payable to the creditors. But the same was not sufficient to meet the claims of the shareholders and depositors. The question arose how that money was to be distributed. It was held by the House of Lords that the money deposited gave rise merely to an *ultra vires* contract of loan, that it did not become the property of the shareholders and that so long as they could identify it they might trace it through any number of changes. As Haldane, L. C., observes at p. 419 : "Whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can follow, but only so long as the relation of debtor and creditor has not superseded the right *in rem,* provided it could be earmarked or traced into assets acquired with it." Similarly Lord Dunedin observes at page 437: "If the proceeds of property can be shown to be a superfluity in the person of the recipient, the Court may hold that the property is traced just as surely as if it was still in its original form".

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8. (1880) L R 13 Ch. D 696. 13. L R (1914) A C 398.

Thus for the first time almost the rational basis of the doctrine of tracing that it was founded on the right of property was enunciated. From that was drawn the corollary that the rule was not confined to cases of fiduciary obligation but was applicable to every case where property was not intended to pass or could not pass. From this again would follow the rule that the right existed so long as the property was not destroyed. The other point decided by the case was that for the purpose of tracing, a mass of assets, to which it could be shown that the trust fund had contributed, might be taken as an entity and that the *cestui que trust* could in such cases claim a lien on the mass. The mode by which their Lordships arrived at the conclusion that the fund to be traced had gone into the assets is also of great interest. The value of the assets then belonging to the society was greater than the amount contributed by the shareholders. It was therefore evident that the depositors' money had gone into the assets. When once that was proved the depositors began to have a right *in rem* in regard to that property. If the shareholders or the directors had stood in a fiduciary relationship to the depositors, the latter would have been entitled to claim a lien on the assets until their amount was paid in full. But, not having any superior equity over the shareholders, the depositors were allowed only to share rateably with the shareholders. It is evident from several passages in the judgment of their Lordships that the result would have been different, if there had been a fiduciary obligation in the case.

After *Sinclair* v. *Brougham* (13) the rule as to tracing may be stated thus: If once it is shown by a *cestui que trust* that the trust fund has augmented the assets of the trustee the right to claim a lien subsists so long as it is not shown that the property is destroyed or dissipated. Thus on the one side the doctrine cannot be invoked if the fund has not been specifically thrown into the trust estate. The decision in *In re Hallett & Co. Ex-parte Blane* (10) is explainable that way There the trustees of a fund directed their bankers who had notice of the trust to collect certain debuntures forming part of the trust fund. The bankers owed a sum of money to the company and the amount due to the trust estate was adjusted towards the amount due to the company. The bankers became bankrupt. It was held by the Court of Appeal reversing a judgment of Vaughan Williams, J., that the doctrine of tracing was inapplicable. As Esher, M. R., said: "Hallett & Co. (the bankers) did not in fact

10. L R (1894) 2 Q B 237. 13. L R (1914) A C 398.

receive any money or tender of money or anything tangible which it would be possible to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Blane (the *cestui que trust*) might have followed it; but he cannot show that; ...... all that can be shown is a settlement of account and a settlement of acount cannot be followed". The same case affords an illustration of the other limit to the doctrine, namely, that the fund cannot be traced if it has been dissipated. The bankers appropriated and expended the fund to their own purposes and it was lost to the trust estate. All the cases which are supposed to lay down a principle contrary to that in *Hallett's case* (8) may be explained in this manner. As Thesiger, L. J., observed in that case: "All cases where it has been held that moneys mixed and confounded, but still existing, in a mass cannot be followed, may be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent."

There is one other aspect of the doctrine which did not arise in *Hallett's case* (8). It assumed that there was a continuous balance standing to the credit of the account equal to the balance against which the charge was claimed. What should happen if the mixed fund had been operated upon to such an extent that, besides exhausting the trustee's own money, a portion of the trust fund had been withdrawn and the trustee subsequently invested money in that account? Vice-Chancellor Wood observed thus in *Frith* v. *Cartland* (12): "*The fund, the trustee has got, must answer the trust to the *cestui que trust* so long as there is money remaining from the original transaction which the Court can trace to fix the trust upon. Therefore it does not come to what was said in argument that according to that so long as a man has any money in his hands it is to be so treated . . . Suppose a trustee sells £1000 worth of stock and spends the money instead of re-investing it in other stock and after that another fund comes to him by way of legacy, you cannot fasten the trust upon that legacy; the trust fund is

*This passage appears only in 34 L J Ch. 301 at p. 304.

8. (1880) L R 13 Ch. D 696.

12. (1865) 2 H & M 417 : 71 E R 525 : 34 L J Ch. 301 at p. 304.

gone, it is annihilated; but, so long as you can trace it, so long as the trustee has one six pence of the trust property traced to his hands, trust property it is and his own title cannot be asserted in any way in respect of it".

The question directly arose for the first time in *James Roscoe (Bolton), Ltd.* v. *Winder* (14). There the facts were similar to those in *Hallett's case* (8), with this difference that, although there was a large ultimate balance, there had been only a very small intermediate balance. A company had authorised *W* to collect all its book debts amounting to about £600. *W* collected the amount and paid £450 into his bank account. Subsequently he drew out a large portion of the money for his own purposes and not in payment of the book debts so that at one date the balance had dwindled down to £25. *W* later on paid in and drew out other moneys so that at his death there was a credit balance of £350 in the bank. In an action by the company claiming a charge on the entire balance, Justice Sargant held that the lien was enforceable only on the intermediate balance of £25. An argument was advanced that the banking account should be looked at as a whole and that the fluctuating balance was subject to one contractual charge or trust. It was rightly rejected, for "one must for the purpose of tracing, which was the process adopted in *Hallett's case* (8), put his finger on some definite fund which either remains in its original shape or in its altered form". It was also pointed out in that case that if the trustee had by any act of his expressed an intention to make good the loss to the trust estate then the charge may be enforced against the ultimate balance.

*Hallett's case* (8) decided one other principle which has been uniformly followed in subsequent decisions. It laid down that, when payments were made by the trustee out of the general account, the payments were not to be appropriated against the payments to that account as in *Clayton's case* (15), because the trustee should be presumed to be honest rather than dishonest and to make payments out of his own private moneys and not out of the trust fund that was mingled up with his private moneys. Thus the earlier cases of *Pennell* v. *Deffel* (11) and *Brown* v. *Adams* (16) applying the rule in *Clayton's case* (15) were overruled. But the rule of specific appropriation of earlier items of credit in discharge of earlier items of debit is even now

8. (1880) L R 13 Ch. D 696. 11 (1853) 4 De. G M & G 372: 43 E R 551
14. L R (1915) 1 Ch. 62. 15. 1 Mer. 572: 35 E R 781.
16. (1869) L R 4 Ch. A 764.

applicable as among competing *cestui que trust* [See *Hancock* v. *Smith* (17), *In re Stenning* (18) and *In re Oatway* (19).]

Before leaving the subject, reference may be made as to how the law stands as regards the *onus* of proof in cases where the doctrine of tracing is invoked. The matter was put clearly by Lord Eldon in *Lupton* v. *White* (20) thus : "If a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole trust must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorised mixture on his part". The rule thus stated has been uniformly applied in subsequent cases. Of course the initial *onus* is upon *cestui que trust* to show that the trust fund was or must have gone into the general assets. The question of *onus* thus becomes material only in cases where the trust funds and the trustee's funds have been mixed and are not capable of apportionment. It has also assumed great importance in cases where the trust fund has been utilised along with the trustee's money in investments in business or in the purchase of land. The rule as to *onus* of proof was recently applied by a Bench of the Madras High Court [see *Lanka Tulasamma* v. *Guntapalli Venkatasubbayya* (21)] to the case of an *executor de son tort* mixing up his own moneys with that of a Hindu widow to whom he stood in a fiduciary relationship.

The right of the *cestui que trust* to follow trust property was raised in a series of Madras cases which arose in the insolvency of Messrs. Arbuthnot & Co. All the learned Judges who decided the cases uniformly recognised the principle laid down in *Hallett's case* (8), the difficulty resting merely in the application of the doctrine. Their Lordships, Benson and Wallis, JJ., observed thus in the *Official Assignee of Madras* v. *Smith* (22): "If A and Co. received the sum in question in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvents on the principle, explained by Sir George Jessel in *In re Hallett's Estate* (8), that where a person mixes money, which it was his duty to keep separate, with his

8. (1880) L R 13 Ch. D. 696. 17. (1889) L R 41 Ch D 456.
18. L R (1895) 2 Ch. D 433. 19. L R (1903) 2 Ch 356.
20. (1808) 15 Ves. Jun. 432 : 33 E R 817
21. (1925) I L R 48 M 597 : 49 M L J 220. 22. (1908) I L R 32 M 68

own moneys and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use rather than the money which he had the right to dispose of ".

Similarly Munro, J., observed in *Official Assignee of Madras* v. *Ramachandra Aiyar* (23) that "money held by a banker in his fiduciary capacity may, if he fails, be recovered in full out of the general assets". In the same case, Abdur Rahim, J., begins with a long statement of the law. He says "the doctrine of following trust property is no longer confined to properties which are capable of being traced *in specie* although it might have been so in olden days. The modern developments of equity enables the court to follow the trust money in all its transmutations and to seize upon the fund or property into which it is traced for the purpose of making good thereout the trust funds. The inviolability of trust money is carried still further. If a person holding money in trust or *quasi trust* mixes it with his own money and then draws out a portion of the blended fund for his own use, he will be held to have drawn his own moneys and no portion of the trust money........ It is only when trust property is shown to be destroyed by misappropriation or otherwise and only to the extent that it is destroyed that the court of equity will deem trust property to be lost...... It is now settled law that the equitable doctrine as to following trust property belonging to one person in the hands of another applies in all its refinements not only to the ordinary cases of trust but of *quasi-trust* such as when money or other form of property is placed in the hands of an agent or a factor for an especial purpose". In another passage the same learned Judge observes: "Before the rule as to following can be applied you must first of all find that the money in question was held in some kind of fiduciary character and where that is wanting the rule cannot apply". This last statement of the law may be open to doubt after the decision of the House of Lords in *Sinclair* v. *Brougham* (13). Each one of the Arbuthnot cases was decided on the particular facts but as pointed out above the English Law as laid down in *Hallett's* case (8) was clearly recognised and applied. [See *Official Assignee of Madras* v. *Lupprian* (24), *Official Assignee of Madras* v. *The Oriental Life Assurance Co.* (25), *Official Assignee of Madras* v. *Krishnaswami*

8. (1880) L R 13 Ch D 696. 13. L R (1914) A C 398.
23. (1909) I L R 33 M 134. 24. (1909) I L R 33 M 145.
25. (1909) I L R 33 M 150.

*Naidu* (26), *Official Assignee of Madras* v. *Krishna Bhatta*(27) and *Official Assignee of Madras* v. *Rajam Aiyar* (28), *on appeal from Official Assignee of Madras* v. *Rajam Aiyar* (29).]

With great respect it has to be said that the recent decision of His Lordship Justice Kumaraswami Sastri, in *Krishnajee Bhat* v. *Sadasiva Tawker* (30) was not rightly decided. The father of the minor plaintiff had entrusted a sum of money to T & Sons, the terms being that T. & Sons should invest the amount at 9 per cent. in their firm or in any other firm as they might deem fit, the amount itself being payable to the plaintiff on his attaining 21 years. T and Sons became insolvent and the plaintiff sued to recover his moneys. His Lordship held applying the principle in *Hallett's case* (8) that the trust fund could be recovered. It may at once be pointed out that the whole case proceeds upon an assumption, namely, that the use of the fund for the business of T and Sons was a breach of trust, whereas in fact it was expressly authorised by the terms of the trust. As His Lordship rightly observed "A trustee cannot use the trust fund for his own purposes. But it is always open to the author of the trust to make a provision to the contrary and remove one of the disabilities, a disability which prevents him from using the money for his own benefit". And this is exactly what was done in the case. In this connection reference may be made to certain passages which appear in the judgment reported in *Official Assignee of Madras* v. *Krishnasami Naidu* (26). There, Munro, J., said "the trustees were directed by the deed to invest the money entrusted to them in a particular way. They did so, and when they have done so their only liability under the trust deed was to renew the deposit from time to time and apply the interest as directed. If the investment turned out badly and the money invested was lost owing to the failure of the bank, the money could be recovered only from the assets of the bank by proving in insolvency". His Lordship Justice Abdur Rahim put it more forcibly thus: "If the settlor chose to make it a term of his settlement that the money should be lent to the trustees themselves hoping to get a profitable return then it is the misfortune of the beneficiaries if the trustees become bankrupts and they must be content to rank as ordinary creditors".

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8. (1880) 13 Ch D 696.
26. (1909) I L R 33 M 154.
27. (1910) I L R 34 M 128.
28. (1910) I L R 36 499 (F B).
29. (1909) I L R 33 M 299.
30. (1926) 24 L W 869.

The decision of his Lordship Justice Waller in *In the matter of M. A. R. N. Firm Insolvents* (31) seems to have been correctly decided in view of the present state of the English Law. There was a fiduciary relationship between the parties and it was admitted that the utilisation of the fund for the trustee's business was wholly unauthorised. Under those circumstances the trust fund was rightly allowed to be traced into the mass of general assets belonging to the trustee-insolvent.

B. V. Viswanatha Aiyar, M. A. B. L.,
Mylapore. *Vakil, High Court.*

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## SUMMARY OF ENGLISH CASES.

MERZ *v.* SOUTH WALES EQUITABLE MONEY SOCIETY, (1927) 2 K. B. 366 (C. A.).

*Promissory note—Execution in favour of secretary of company—Company beneficially interested—Legality—Money-lenders Act,* 1900, *S.* 2, *sub-section* 1 (*c*).

S. 2, sub-section 1 (*c*) of the Money-lenders Act, 1900, provides that "A money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name."

Certain persons borrowed a sum of money from the respondent company which was registered under the Money-lenders Act, but the promissory note was executed in the name of *W* or other secretary for the time being of the company. In an action for a declaration that the promissory note was illegal and void.

*Held,* reversing a judgment of Wright, J., that the promissory note was not in the registered name of the company, that it could not therefore be sued upon by the company and was therefore void and unenforceable.

*Quaere* : Whether a promissory note payable to bearer or indorsed in blank by the promisee and then taken by the money-lender as security would be within the Act?

31. Unreported Application No. 418 of 1927 in I. P. No. 278 of 1925.

EVANS *v.* PIAUNEAU, (1927) 2 K. B. 374 : 96 L. J. K. B. 734.

*Alien—Change of name—Addition of words "& Co." for business purposes—Effect—Aliens Restriction (Amendment) Act,* 1919, *S.* 7, *sub-section* (1).

S. 7, sub-section (1) of the Aliens Restriction (Amendment) Act, 1919, runs thus: "An alien shall not for any purpose assume or use or purport to assume or use or continue after the commencement of this Act the assumption or use of any name other than that by which he was ordinarily known on the fourth day of August, one thousand nine hundred and fourteen."

A French subject, named *P. P.* and known as such on August 4, 1914, commenced a business in England in 1926 under the name of *"P. P. & Co."* The question arose whether there was a change of name or a mere change of style.

*Held,* that *"P. P. & Co."* is a name and that the alien subject in so describing himself assumed a name different from that by which he was ordinarily known at the material date, thus violating the provisions of S. 7, sub-section (1) of the Aliens Restriction Act.

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COLLINS *v.* HENRY WHITEWAY & CO., (1927) 2 K B 378.

*Defamation—Libel—Communication to 'Court of Referees' under Employment Insurance Act,* 1921*—Privilege.*

A Body called the "Court of Referees" was constituted under the Unemployment Insurance Act of 1921 to decide disputes as to unemployment benefits on a reference by the insurance officers. A letter alleged to contain a libel was written to that body and the question arose whether it was a privileged communication.

*Held,* by Horridge, J., that the Court of Referees merely discharged administrative duties which need not be performed in Court but in respect of which it was necessary to bring to bear a judicial mind and that consequently the communication was not absolutely privileged.

*Royal Aquarium and Summer and Winter Garden Society v. Parkinson,* (1892) 1 Q B 431, at pp. 447, 448 and 452, relied on.

FAREY *v.* COOPER, (1927) 2 K. B. 384 (C. A.).

*Goodwill—Deed of assignment—Agreement to aid in realisation of property—Covenant not to solicit customers whether implied—Instigation by third party to solicit customers—Liability.*

The rule in *Trego* v. *Hunt* (1896 A C 7) that a person who voluntarily disposes of the goodwill of his business cannot canvass the old customers does not apply to the case of the sale of the debtors' business by the trustee under a deed of assignment unless there is a covenant to that effect. The mere fact that the debtors in such a case agreed to "aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors" does not give rise to an implied covenant not to do anything which will depreciate the value of the property as by soliciting the old customers. In such a case the debtors cannot be restrained by injunction from soliciting customers and a third person who instigates such conduct cannot be made liable in damages for procuring the breach of a covenant.

*Per Bankes, L. J.*—Assuming an implied covenant not to solicit customers can be made out as between the trustee and the debtors the third person will be liable only if it is shown that he knew of the obligation and infringed it.

Judgment of Finlay, J., reversed.

*Walker* v. *Mottram* (19 Ch. D. 355), discussed; *Green & Sons (Northampton)* v. *Morris,* (1914) 1 Ch. 562, approved.

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PALMOLIVE CO. (OF ENGLAND) *v.* FREEDMAN, 96 L. J. Ch. 402.

*Contract—Price maintenance agreement—Reasonableness—Public policy—Restraint of trade—Injunction to enforce contract.*

The plaintiff company, who sold a certain toilet soap, entered into a price maintenance agreement with the defendant, who was one of their customers, by which he was assured of certain bonus terms on his agreeing to sell the soap "however acquired" at such prices as may be fixed by the company. Thereupon the company supplied goods to the defendant but it appeared that he sold the same at less than the fixed price. In an action by the company to enforce the contract by an injunction. the defendant pleaded that the goods he sold had been purchased by him from sources other than the company.

*Held,* by Astbury, J., that the contract was reasonable and not one in restraint of trade or opposed to public policy and that the injunction should be granted in order to secure its performance irrespective of the source of supply of the goods.

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PUTSMAN *v.* TAYLOR, 96 L. J. K. B. 726 (C. A.).

*Restraint of trade—Agreement of service—Promise not to engage in business for five years at three places—Validity—Severability of contract.*

A contract of service provided that, after the termination of the period of employment, the employee, who was well-known as a man of experience and ability, should not, for a period of five years and within the three places of business of his employer, be employed in any capacity with any person carrying on business similar to that of the employer.

*Held,* affirming a judgment of the Divisional Court in (1927) 1 K. B. 637 that the contract taken as a whole was a reasonable protection which the employer was entitled to stipulate and that the same was not one in restraint of trade. [It was considered unnecessary to go into the question of the severability of the contract.]

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WOOLWICH CORPORATION *v.* ROBERTS, 96 L. J. K. B. 757 (H. L.).

*Local Government—Borough Council—Excessive payment to employees—Order of surcharge—Legality.*

Where a borough council went on making payments to employees on the Fulham and Industrial Council's scales ignoring the fact that they were temporary arrangements and the auditor surcharged the councillors for the amount paid as wages in excess of the reasonable rate.

*Held,* by the House of Lords affirming a decision of the Court of Appeal that the order of surcharge was rightly made.

*Per Lord Phillimore.*—"It seems sometimes to be forgotten that the council of a borough is not the employer. It is only the steward of the rate-payers and inhabitants, and must act as a faithful steward."

*Roberts* v. *Hopwood,* (1925) A. C. 578 applied.

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OAKLEY *v.* WILSON, 96 L. J. K. B. 783.

*Landlord and tenant—Relationship when arises.*

*Per Acton, J.*—"The relation of landlord and tenant in its ordinary legal significance arises whenever one party confers

on another the right to exclusive possession of premises, for example, of a dwelling-house, for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of a tenancy from year to year or of a quarterly, monthly, or weekly tenancy. This relation is created by contract to which there is usually, though not necessarily, incident a right on the part of the landlord to receive from the tenant payment for the use of the premises in the shape of rent.... The relation of landlord and tenant is fully established only when the tenant has entered on the premises let in pursuance of the contract."

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IN THE ESTATE OF LAVINIA MUSGROVE; DAVIS *v.* MAYHEW, (1927) P. 264 : 96 L. J. P. D. & A. 140 (C. A.).

*Will—Proper execution—Non-disclosure by executrix for twenty-five years*—'Omnia rite esse acta'—*Applicability.*

The testatrix bequeathed her properties to the illegitimate daughter of her cousin by a will dated 1890 and died in 1905. The mother of the legatee who was appointed executrix did not put forward the will down to her death which occurred in 1924. The legatee having predeceased her mother, her husband who found the will in a desk belonging to the executrix propounded the will. It was found that the testatrix was a good business woman and that the will was in proper form, the signatures of the executant and of the attesting witnesses who were dead having been proved.

*Held,* reversing a judgment of Hill, J., that the maxim *"omnia rite esse acta"* would operate in favour of the will, after the proof given of the execution and attestation, to establish that the testatrix knew and approved of its contents. The suspicion arising from the fact of non-disclosure of the will by the executrix throughout her lifetime would be immaterial, the same having arisen at a later date when the will had begun to run its course as an effective instrument.

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DONALD CAMPBELL & CO. *v.* POLLAK, (1927) A. C. 732 (H. L.).

*Practice—Costs—Discretion of Trial Court—Appeal—Error of Law.*

Where the trial Judge decided the issues of fact in favour of the defendant but gave judgment for him without costs on

the ground that he had been guilty of improper conduct and the Court of Appeal reversed the order as to costs on the ground that the discretion was wrongly exercised.

*Held* (Viscount Sumner and Lord Shaw dissenting) that although the House will not review an exercise of discretion as to costs, it will entertain an appeal for costs only where the order of the Court of Appeal is founded on an error of law. Also that, where the discretion as to costs has been exercised judicially, the Court of Appeal cannot, under law, entertain an appeal against the order merely because in its opinion the reasons alleged are insufficient.

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JONES *v.* SOUTH-WEST LANCASHIRE COAL OWNER'S ASSOCIATION, (1927) A. C. 827 (H. L.).

*Income-tax—Mutual Insurance Association—Annual surplus—Liability to income-tax.*

An association had for its sole effective purpose the indemnity of its members against liability for compensation in respect of fatal accidents to workmen in their employment. It was a purely mutual concern, every person indemnified being a member of the association and every member being indemnified by the association. Under the articles of association a fund was to be established by means of "ordinary calls" to be made yearly upon the members in proportion to their disbursements by way of wages or salaries; out of this fund the members were to be indemnified against claims for compensation, and at the end of each year the surplus of the fund over the expenditure and liabilities of the association was to be carried to a reserve fund. The association was also empowered to make "extraordinary calls" upon the members for the purpose of meeting any deficiency in the fund or for strengthening the reserve. There were provisions for substitution in the case of the death of a member or transfer of his interest in the concern and for payment of a gratuity to a retiring member. The funds were to remain with the association and in the event of a winding up were to be divided among the members in proportions prescribed. The question arose whether the association was assessable to income-tax in respect of the surplus of its receipts in each year over the expenditure for the year as being profits of a trade or business.

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*Held,* affirming a decision of the Court of Appeal in (1927) 1 K. B. 33 that the association was not liable to income-tax on the annual surplus.

*New York Life Insurance Co.* v. *Styles,* (1889) 14 A. C. 381, followed.

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BAKER *v.* ARCHER-SHEE, (1927) A. C. 844 (H. L.).

*Income-tax—Foreign will—Legatee resident in England—Income not remitted to England—Liability for income-tax.*

A person in the United States left a will by which he directed the trustees who were resident in that country to hold the settled residue upon trust to apply its income and profits to the use of his daughter for her life. The trustees were given full power to invest and re-invest the trust fund subject to the consent of the legatee. The trustees paid the net income belonging to the daughter who was in England to her order at a bank in America. The question arose whether the income was assessable to income-tax under Case IV of Schedule D of the Income-tax Act, 1918.

*Held* (Viscount Sumner and Lord Blanesburgh dissenting) that the income was liable to income-tax.

Decision of the Court of Appeal reversed; judgment of Rowlatt, J., restored.

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METROPOLITAN MEAT INDUSTRY BOARD *v.* SHEEDY, (1927) A. C. 899 (P. C.).

*Statutory Board—Control by Crown—Wide powers of management—Receipts not part of State revenue—Debt due to Board whether Crown debt—Priority—Meat Industry Act of New South Wales,* 1915.

The Meat Industry Act of New South Wales, 1915, established the appellant Board, vested certain properties in that body and provided for the regulation of the slaughter of cattle and for other ancillary purposes. The Governor of the State appointed the members of the Board and could veto certain of their actions; he also appointed the officers for the administration of the Act on the recommendation of the Board. But otherwise the Act conferred on the Board wide powers which were to be exercised at its own discretion and without consulting the representatives of the Crown. Also the Board paid its receipts not into the general revenue of the State but into its own fund. The question arose whether a debt due to

the Board constituted a debt due to the Crown so as to be entitled to priority.

*Held,* that the appellant Board not being servants of the Crown acting in its service, the debt was not a crown debt so as to be the subject of priority.

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ONTARIO JOCKEY CLUB *v.* MCBRIDE, (1927) A. C. 916 (P. C.).

*Company—Transfer of shares—Right of pre-emption under by-law—Agreement by shareholder to observe by-law—Breach—Rights of transferee.*

S. 54 of the Ontario Companies Act of 1912 provides as follows: (1) The shares of the company shall be deemed personal estate and shall be transferable on the books of the company, in such manner and subject to such conditions and restrictions as by this Act ....... or by-laws of the company may be prescribed. (2) No by-law shall be passed which in any way restricts the right of a holder of paid up share to transfer the same, but nothing in the section shall prevent the regulation of the mode of transfer thereof.

A by-law of the appellant club, passed in 1910, required that before any shareholder could transfer a share to any person not already a shareholder of the club, notice should first be given to the club and that it should have the right to sell the same to a purchaser at a price to be ascertained under the by-law or at any less price fixed by the seller. A certificate for certain shares issued to a shareholder in 1916 contained a restrictive footnote setting forth the above by-law and the shareholder accepted the shares subject to those terms. In 1923 he transferred one of his shares to the respondent who was not already a shareholder. When presented to the club, registration of the transfer was refused on the ground that there was a breach of the terms of the agreement. In an action to enforce registration,

*Held,* that, whatever may be the binding force of the by-law as such, the club was entitled to refuse to register the transfer because by the agreement of the transferor the shares were transferable only subject to the right of pre-emption expressed in the by-law.

*Per Lord Wrenbury.*—"Shares are *prima facie* transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. It may

be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid".

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* CANADIAN PACIFIC RAILWAY CO., (1927) A. C. 934 (P. C.).

*Tax—Direct and indirect—Difference—Tax on fuel-oil—Nature.*

While a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. Thus a tax levied on brokers, agents, factors or sellers is obviously indirect.

*Held,* that fuel-oil is a marketable commodity and therefore the tax levied thereon is an indirect one.

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## JOTTINGS AND CUTTINGS.

### THE LATE SIR T. SADASIVA AIYAR.

#### REFERENCE IN THE HIGH COURT.

Touching references were made this morning (25th November, 1927) in the High Court regarding the sudden demise of Sir T. Sadasiva Aiyar yesterday evening at his residence in Royapettah. The Chief Justice and all the other thirteen Judges assembled in the second Court Chamber, the biggest hall in the High Court buildings. The hall was fully packed with practitioners and the important members of the executive staff of the Court were also present. Owing to the unavoidable absence of the Advocate-General, Mr. Venkatarama Sastri, Dewan Bahadur T. R. Ramachandra Aiyar, President of the Vakils Association, moved the reference.

Mr. T. R. Ramachandra Aiyar said:—"My Lords, it is my painful duty to bring to your Lordships' notice, in the absence of the Advocate-General who is absent from Madras, that the cruel hand of death has snatched away from us one of our best

men Sir T. Sadasiva Aiyar. His death was very sudden. Only a few days back, I heard through a friend that he was even unwell, and it is only day before yesterday that I heard he was seriously unwell and before I could make any enquiry, he is gone.

He was born in 1861 in the District of Tanjore. He had his early education in Kumbakonam. He had his guidance from those distinguished educationists, Messrs. Porter and Gopala Rao. He had a brilliant university career. He passed his B. L. and was enrolled in 1882. He worked for a time in the High Court with Mr. Guruswami Aiyar and I remember well those days, when he showed those eminent qualities which qualified him for the future. He became a Munsif afterwards. When he was a Munsif at Madura I went for a case there and curiosity took me to his Court. I found he was deeply engaged in the case. The vakils were standing around his seat and I found there was a kind of joy and satisfaction in their faces that testified to his great ability and sincerity of purpose. He subsequently became a Subordinate Judge and afterwards his services were lent to the Travancore Government and he was Chief Justice in Travancore for about 6 years. During that period, he gave a tone to the judicial administration of Travancore, and I know that even to-day his name is revered and respected by all in Travancore. He afterwards came as a District Judge and eventually was elevated to the High Court in 1912.

From that time we are all familiar with his doings as Judge. His fearless independence, his thorough honesty of purpose, his great patience, his knowledge of law and his intimate knowledge of men and things made him one of the most eminent Judges who adorned the High Court Bench. He was kind to the members of the Bar and to the establishment of the High Court, who had requested me to express their feelings to your Lordships. In fact, the juniors felt that they would receive great encouragement from him when they appeared before him. He would tell them, "Here is an opportunity to distinguish yourself in the absence of the senior and you will receive sufficient encouragement from the Bench." His judgment in the Poondi murder case was one of his early triumphs. His judgment in the Varadarajulu case established the supremacy of Law over the will of the executive and proved also his fearless independence.

Outside the Court, he moved very freely with all people, humble and elevated. He was President of the Mylapore Club and as such those in Mylapore were able to know him intimately and felt his great help to them. He subsequently became the President of the Endowments Board and he died in harness. That Board owes what little reputation it has to his great personality. My Lords, it is seldom that we have the rare good fortune of having such an eminent Judge discharging judicial functions in one of the highest Courts".

Mr. J. C. Adam on behalf of the Advocates of the High Court associated himself with the sentiments expressed by Mr. T. R. Ramachandra Aiyar. "Sir T. Sadasiva Aiyar", he said, "was a very just and upright Judge, and gained the esteem of his brother Judges, and the members of the legal profession. He was also well-known for his learning and he was esteemed not only in his judicial capacity but also in the outside and popular world. The speaker expressed his condolences to the relatives of Sir Sadasiva Aiyar on their sad bereavement".

*The Chief Justice's Tribute*:—The Chief Justice said :—Mr. T. R. Ramachandra Aiyar and members of the Bar, I desire to associate myself and my colleagues with what has been said by you on behalf of the bar about our late colleague, Sir T. Sadasiva Aiyar. In him a very distinguished figure has passed from our midst though, let us not forget, he had lived to a ripe old age after what, I am sure, was not only a useful but a happy life. His career seems to me to be a striking example of how far ability and devotion to duty may carry one who starts, as he started, from the bottom rung of judicial ladder. During the five years I served as his colleague on the bench I was nearly the whole period sitting on the original side; but for three months I had the advantage of being posted to sit with him to deal with miscellaneous civil work which, as you all know, is concerned largely with questions arising in execution, a subject on which he was a past master and I was totally ignorant. I shall never forget the patience and courtesy with which he tried to teach me how to handle such matters and bore with my inexperience. His colleagues used to chaff him—with entire good nature—as being prone to legislate from the Bench when he thought that the law lagged behind the real consciousness and the real needs of the people of India. But that sprung from qualities which no one could fail to respect—independence of

judgment and courage in speaking what was in his mind and an ardent desire to reform what he felt to be socially wrong conditions imposed by the fetters of law.

His mind was essentially liberal in the best sense. He had the equipment that goes to the making of a great Indian Judge. He was an accomplished Sanskrit scholar, a very learned lawyer and one who brought a very human personality to bear on the dry bones of law. His monument as a Judge remains in the numerous decisions of his which stand in our reports and which testify alike to his knowledge and to the breadth of his outlook. Though his was essentially a gentle and compassionate spirit, as a criminal Judge he had no sentimental pity for those who had committed cruel and heartless crimes, and to them he did not fail to mete out their fitting punishment.

But it is not alone as a just, able and conscientious Judge that he will live in the memories of those who knew him. He was essentially generous; in the narrow sense of that word he helped with gifts of money which his kindliness called loans to many poor students. This has come within my own personal knowledge; and I believe to more than one struggling practitioner at this bar. But he was generous in a wider and higher sense. He always took the best views of the motives that might be supposed to influence other men's actions and credited them accordingly, until it was forced upon him that his confidence was misplaced. That sometimes happened and he felt it very keenly. But it never soured him or made him cynical and he continued to believe the best of every one with whom he came in contact, until it was demonstrated that he was mistaken. Every one who worked under him on this bench regarded him with respect and real personal affection, as indeed all who knew him.

Mr. Ramachandra Aiyar, I ask you to convey the respectful sympathy of myself and my colleagues to Lady Sadasiva Aiyar and other members of the family in their bereavement. I would have wished to show my respect to his memory by being present at his house when the funeral ceremonies began, as no doubt many of my colleagues also. But the end was so sudden and the ceremony followed it so soon that time rendered it impossible".

His Lordship the Chief Justice and his colleagues then left the Court-hall to attend to their respective work [*The Hindu.*]

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*Journalism and the Bar*:—So that point was settled; and it was of course notorious that many of the most able Judges began their legal career as solicitors. But a point which caused far more trouble and searching of heart was whether bar students and members of the Bar ought to exercise the art of journalism for reward. The Benchers of Lincoln's Inn went so far as to pass a resolution the effect of which would have been to exclude from the Society all persons connected with the public press. One of the banned persons petitioned the House of Commons and it is reported that the Benchers were flagellated in the debate which ensued. Sheridan was one of the most effective speakers and referred to Burke and Dr. Johnson as journalists who were obviously fit, not only for the bar, but for the highest offices in the State. In fine, the Benchers withdrew.

Yet it was said of Lawrence, J., who was in general remarkable for his courtesy, that he displayed towards such barristers as were connected with the press a roughness altogether opposed to his habitual urbanity. And his dislike was said to be justified by the fact that many of these men "employed the meanest artifices to obtain practices and endeavoured to acquire reputations by constantly inserting their names in the paper".

—*The Law Journal*, October 8, 1927, p. 247.

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*The Death of Serjeant Buz-Fuz*:—More than ever recently writers and commentators have referred to the altered (and improved) tone of successful advocacy. The styles of Sir John Simon and Norman Birkett are referred to as typical; and no regret is expressed at the passing of the roaring, blustering methods which survived for long after the pen of Dickens had so searchingly described them. Truth to tell, the genus is not yet entirely dead, and if we have no genuine Buz-Fuz, we are not yet entirely free from the Blowhards of the Forensic Fable.

The increasing proportion of civil cases which are now heard by a Judge alone is largely responsible for the change. It is no good addressing a modern Judge "as if he were a jury", nor is it always profitable to cross-examine a witness in the antique fashion. But the big-voiced men of wrath are not quite extinct. They may be seen and heard sometimes at the Old Bailey; not infrequently in County Courts in running down cases; and occasionally even in the Royal Courts of Justice.

I once heard an Indian barrister—a rare instance—harangue their Lordships in the Privy Council as if they were an unusually common jury.

—*The Law Journal,* October 8, 1927, p. 247.

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*The New Lord Justice* :—No surprise is felt by the profession at the appointment of Mr. Justice Greer to succeed Sir John Eldon Bankes as a Lord Justice of Appeal. Sir Frederick Greer, like many others who have become famous at the Bar and on the Bench, commenced his career at Liverpool, where he practised for more than twenty years. After coming to London and taking silk, he speedily became one of the most sought after leaders in the Commercial Court, and his was one of the first judicial appointments made by Lord Birkenhead. From the first he showed himself to be an ideal Judge ; learned, patient and courteous. His promotion to a higher grade in the judicial hierarchy was only a matter of time, and that it has come as early as possible—there has been no vacancy for a Common Law Judge in the Court of Appeal since his appointment in 1919 until now—is eloquent testimony to his great abilities and to the reputation which he has earned during the last eight years. Of Sir John Eldon Bankes the profession takes leave with great regret. He has for a number of years presided over one of the Courts of Appeal with an ability and a dignity which have added lustre to the Bench. He carries with him into retirement the affectionate respect of every member of the profession who has ever appeared before him.

—*The Law Journal,* October 15, 1927, p. 249.

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*A Question of Etiquette* :—We notice a story in the Press as to the return of fees by counsel who is appointed to the Bench before the case is heard. It is said that, once upon a time, the firm who had paid the cheque suggested it should be returned, whereupon the new Judge explained that this would unfortunately be contrary to etiquette. "Yes, yes", was the answer, "we were afraid your Lordship would be in that predicament, and so we've stopped the cheque." No doubt this story is of the *ben trovato* order, but in fact the practice appears in former times not to have been uniform, some eminent Judges maintaining that it was not the usage to return fees under such circumstances. Sir John Hollams, however, in his "Jottings", relates one conspicuous example to the contrary. The first

intimation he had of the appointment of Lord Selborne as Lord Chancellor was the receipt of a cheque for fees which had been paid on a brief in the House of Lords. And that was a case where, Sir John Hollams goes on to say, a different course might have been followed. The papers were heavy, and Lord Selborne had been two days at the House of Lords waiting for the case to come on; yet he returned the whole of the fees. What is the present practice we forbear to speculate. And the question is not in all cases of practical importance, for the rule that fees are to be paid with the brief is not universally observed.

—*The Law Journal*, October 15, 1927, p. 251.

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*"Protesting" in a Cathedral* :—The religious atmosphere at the present time seems to be charged with a very high degree of doctrinal electricity, and it is difficult to see how the cause of true religion can be promoted by what is undoubtedly a course of procedure that might lead to proceedings in the Courts. We gather from the newspaper reports that no such proceedings are likely to result from the incursion of a City vicar and his congregation into St. Paul's Cathedral last Sunday morning: but even so, is not the habit of procuring publicity for some grievance or for propaganda by deliberately challenging legal proceedings as in this case calculated to bring the law into contempt and disrepute? "Demonstrations" of every sort against established authority are not conducive to reform; they only tend to arouse more bitterness of feeling.

—*The Law Journal*, October 22, 1927, p. 273.

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*Sergeant Dowse's Views Thereon* :—"The speech of his honourable and learned friend", said Mr. Dowse, in reply to Sir John Coleridge, "drifted in the direction of the argument that, if we had a female Sovereign, we might have a female Attorney-General, a female Speaker, a female Leader of the Opposition, and a female Prime Minister; and because this Bill was drifting into that he did not see his way to voting for it. He was quite aware that many a Judge had been an old woman: but that was no reason why every old woman ought to be a Judge". Lord Coleridge himself laughed at this sally and quoted it much in after years. But it was a poor argument, and sounds remote in our own day when women are, in fact, members of the Government.

Dowse had probably in mind a Judge of his own country; commonly referred to as " the old woman". He it was who on one occasion tried to dam the flow of speech of an old lady who insisted on telling the Court what she would do if she were on the Bench. "An old woman is not fit for the Bench", he cried; to which she made answer: "Shure your lordship ought to know from experience".

—*The Law Journal*, October 22, 1927, p. 288.

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*Killing in Mercy* :—The case before Mr. Justice Branson at the Chester Assizes last Saturday, in which a father, who was alleged to have drowned his child in order to put an end to its sufferings, was acquitted on the charge of murder, has received wide and sympathetic notice in the Press. Murder is defined as unlawful homicide with malice aforethought. "Malice aforethought" implies that the homicide is intentional; "unlawful" that it is without just cause or excuse. Just cause or excuse may exist in many cases; notably in the exercise of theh right of self-defence; but the law does not recognise it in circumstances like those in the Chester case. "The law of this country", so the learned Judge directed the jury, "puts so much store upon human life that it could not allow a man, even from the best of motives, to take a life". The jury in returning a verdict of not guilty, may have considered that the child was really dead before the father, as he thought, drowned it. Otherwise the verdict showed that the jury declined to administer a harsh law. Of course, the problem of "euthanasia" is not new, and it is a question whether the jury should intervene on compassionate grounds, or whether the correct verdict should be returned, and the event left to the prerogative of mercy. We see that Sir Arthur Conan Doyle has made the suggestion that three medical certificates should suffice. But what course doctors really take when death is certain and agony intense is a question of medical practice which does not call for minute inquiry. The Judge found, in fact, though not in law, "a motive of love and pity for the child's suffering" to be a sufficient excuse. We notice that in the Petlura case in Paris the old plea *Sic semper tyrannis* has been allowed to be a sufficient excuse.

—*The Law Journal*, October 29, 1927, p. 290.

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*Criminal Appeals* :—The value of the Court of Criminal Appeal is not to be estimated only by the number of successful

appeals which are made to it; its very existence necessarily engenders a greater carefulness in the Courts of first instance. Recently, however, the Lord Chief Justice, Avory and Salter, JJ., have reversed a considerable number of decisions, and in other cases have made substantial reductions in sentences passed by the lower courts. Perhaps the most significant of the cases is that of *Rex* v. *Watson,* in which a sentence of five years' penal servitude was reduced to one of nine months' hard labour, after a conviction at Middlesex Sessions on a charge of sacrilege in breaking into a church at Potter's Bar and stealing therefrom the sum of eightpence. It is, of course, a fact generally recognised that even a highly qualified magistrate may take an unduly harsh view of a particular offence or of a particular kind of offender; and it is of supreme importance that the resulting sentences should be subject to revision by a tribunal composed of Judges of undisputed eminence and impartiality. This is the great merit and justification of the Court of Criminal Appeal.

—*The Law Journal,* October 29, 1927, p. 291.

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*Reduction of Sentence* :—The Court of Criminal Appeal (Lord Chief Justice, Mr. Justice Avory and Mr. Justice Salter), on Monday, the 24th instant, criticised a sentence passed by Sir Montagu Sharpe, K. C., the chairman of the Middlesex Sessions, on George Watson, who had been convicted of sacrilege.

The Lord Chief Justice, in giving the judgment of the Court on Watson's appeal against sentence, said that Watson had stolen eightpence from a church at Potter's Bar. Watson was aged 72, and since 1890 he had had 20 convictions recorded against him, four of them resulting in sentences of penal servitude. In 1923 a sentence of five years' penal servitude was passed on him at Middlesex Sessions for stealing, but it was reduced to three years' penal servitude by the Court of Criminal Appeal.

Sir Montagu Sharpe, in passing sentence on the present occasion, thought right to observe that if Watson's previous sentence had not been reduced he would have been in prison at the time of his last offence, and, therefore, could not have committed it. It was not very easy to follow the reasoning which underlay that statement, but, on one view of it, it seemed to say that everyone who was sentenced had better be sentenced to penal servitude for life lest he should commit another offence.

A proper sentence to be passed on Watson was nine months' imprisonment with hard labour.

—*The Law Journal,* October 29, 1927, p. 305.

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*Surrejoinder, Rebutter, and Surrebutter* :—Rejoinders I have seen in and about the Royal Courts of Justice on several occasions; but mine eyes have not yet beheld any modern example of the Surrejoinder, the Rebutter or the Surrebutter. These three, according to Bullen and Leake, "are now very seldom seen". This cautious and regretful reference appears to imply that they have been observed on recent occasions; yet if any man told me he had seen a Surrebutter since the war, I should accept his statement with as much reserve as if he informed me he had seen a ghost. No; there are no great fortunes made nowadays from such draftings. The Statement of Claim, the Defence and Counterclaim, the Particulars and the Further and Better Particulars suffice for our simple needs.

Baron Parke—otherwise called Baron Surrebutter—was in his day and generation the great authority on such matters, and it is told how he sought to cheer a dying friend by producing a "special demurrer" at the bedside. "It was so exquisitely drawn", he observed, "that I felt sure it must cheer him to read it". That story is apocryphal which states that when spirits and ordinary restoratives failed, he was once brought out of a fainting fit by the rough but incredible device of putting an ancient and musty collection of pleadings in the neighbourhood of his nose.

—*The Law Journal,* October 29, 1927, p. 306.

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*Legislation by "Regulations"* :—The Master of the Rolls has now emphatically associated himself with the protests made by the Lord Chief Justice here and in America against bureaucratic tyranny. As the guest of the Metropolitan Grocers' Association, Lord Hanworth, replying to the toast of "The Houses of Parliament", commented upon some remarks made by the proposer of the toast, who complained of the harassing of retail traders by departmental regulations and bureaucratic interference generally. The learned Master of the Rolls observed that there was no question whatever that this matter was engaging public attention with greater force and weight than ever before.. During the war they had a taste of regulations cheerfully submitted to, but they then learned how unpleasant

"Dora" was. He was prepared to associate himself with what had been said by the Lord Chief Justice, who had on two occasions recently protested against Parliament handing over its functions to permanent officials, and having regulations instead of legislation. In his opinion, the control exercised by laying regulations on the table of the Houses of Parliament was one that did not lend itself to action, but he thought that if members would more frequently put down motions to reject regulations so laid upon the table, that would be an impediment to such regulations going through until the matters they dealt with had been openly discussed.

—*The Law Journal,* November 5, 1927, p. 307.

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*The Ethics of the Problem* :—It must be admitted that the law as to betting and gaming is in an unsatisfactory state; it not only discriminates—in the result—between rich and poor by permitting credit betting and prohibiting what is known as ready-money betting away from race-courses, but it discriminates between various sorts of gaming in an altogether illogical manner. Mr. A. P. Herbert, in a letter published in Monday's *Times,* draws attention to this, and it is impossible not to agree with him. And we wish him well in the crusade which he apparently intends to undertake to get the law put on a more sensible footing. But when Mr. Herbert suggests that there should be "equity between the vices" of drink and betting with regard to taxation—he points out that whisky is taxed 60 per cent., and betting 2 per cent.—he is, we think, befogging the issue he himself has raised. Neither drink nor betting is taxed because it is a vice; each is taxed to provide revenue. There is a point at which indirect taxation becomes so heavy that it results in a diminished revenue; the tax on spirits has not yet passed that point; and we may be sure that if the authorities are of opinion that the betting tax can be increased without risk of such a loss, it will be increased. If, as Mr. Herbert's argument would appear to suggest, the rate of tax on "vices" is proportionate to the official view of their harmfulness, what vicious persons those of us who consume tobacco must be considered to be.

—*The Law Journal,* November 5, 1927, p. 308.

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*Young—For a Lord Chancellor* :—Lord Cave, who recently denied in vigorous and unequivocal terms an unfounded

rumour of his alleged intention to retire from the office of Lord Chancellor, is seventy-one, very young for an office which has at all times proved one of the healthiest occupations in the realm. Indeed, the exceptions are so few that it may be said with truth that Lord Chancellors never die, and never voluntarily retire from their great responsibilities. Lord Cave says that he can do his twelve hours a day without fatigue or any indication that the years have impaired the quality of his work; and this is manifestly so. Ignoring for the moment—and only for the moment—such youthful prodigies as Lord Birkenhead, the present Keeper of the King's Conscience is, for a Lord High Chancellor, a mere stripling. The late Earl of Halsbury occupied the Woolsack, and delivered good, confident and impressive judgments until the year 1905, when he was eighty-two years old. The "Lives of the Chancellors" include many who were, if anything, not quite old enough at seventy years.

—*The Law Journal*, November 5, 1927, p. 323.

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*A Feudal Survival* :—That some relics of feudalism, however futile and fantastic, still linger in the land is a fact which annually brings a tear to the appreciative eye of the lover of legal antiquities. Whereby the recent rendering of quit-rent services by the Corporation of the City of London in respect of the Moors in Shropshire and the Forge in St. Clement's Dane evoked great interest and publicity. The Crown, in the person of the King's Remembrancer, Sir George Bonner, appropriately dressed for the occasion, received the services, but unfortunately they were rendered by the City in the person of a solicitor; a good man and true, no doubt, but still, a solicitor. In my opinion, the Lord Mayor's Coachman would more appropriately have filled this mediæval part.

For the Moors, a hatchet and a bill-hook; and for the Forge, six horse-shoes and sixty-one nails. Why the odd nail? It would be erroneous to suppose that the King's Remembrancer has by him an accumulated store of hatchets, bill-hooks and horse-shoes. Apparently they find their way back to the City after the ceremony and in due course appear again annually at each succeeding rite. It is authoritatively stated that the horse-shoes have so done duty for five centuries; and that the Forge was that granted to Walter le Brun in 1235 by the Knights Templars, for his good work in shoeing the horses for the tournaments by the river.

—*The Law Journal*, November 5, 1927, p. 323.

*The Husband's Lost Dominion* :—Once again a misguided husband has unconsciously and unsuccessfully relied on the law as stated in Bacon's Abridgment that he "hath by law power and dominion over his wife, and may keep her by force within the bounds of duty and may beat her, but not in a violent and cruel manner". It was left to Mr.. Rooth to put this husband right in his law and to fine him for the assault upon his wife, and further to warn him of the possibility of "durance vile" if he persisted in giving a demonstration of power and dominion no longer recognised by the law.

Herein may be observed the distinction between an old Common Law rule and a provision in an antique, but unrepealed statute. If that passage from Bacon had appeared in such a statute, it could not be rejected as a defence, although means would, no doubt, be found, by misinterpretation, of getting round it. The obsolete statute is of little use in modern times as a sword, although it may on occasion be a satisfactory shield. This law of husband and wife certainly needs an up-to-date remedy. Alas (say some reformers), the masterful powers of the husband to kick and even to kiss his wife have gone; but in many serious matters he is liable for her deeds and misdeeds as if these mediæval powers and privileges were still in full legal force and operation.

—*The Law Journal,* November 5, 1927, p. 323.

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*MaCardie, J., on Women* :—For one reason, if for no other, many married and legal men are glad that McCardie, J., continues to be free from matrimonial embarrassment. Who but a bachelor could say what he did in fact say last week about women in a breach of promise action in which, moreover, the only counsel appearing was a woman? Some folk are apt to regard his observations as the immature speculations of an unmarried youth who knows nothing about women. I do not share those views. He can see facts as clearly as any married Judge. One does not say he is more courageous than they; but he is more free.

The Lord Chief Justice, Eve, J., and others have espoused the cause of law in general in its opposition to the encroachments of the bureaucracy. It is for McCardie, J., to use every legitimate opportunity in pointing out and denouncing the legal hardships which a modern husband so patiently endures. In the law of torts the injustices to man are manifest; the

waters of Equity are greatly troubled by them; they appear in almost every branch of law, and it is high time they were removed.

—*The Law Journal,* November 5, 1927, p. 323.

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## BOOK REVIEWS.

PROVINCIAL SMALL CAUSE COURTS ACT, by K. J. Rustomji, Barrister-at-law, 3rd Edition, 1927. Published by Puri Brothers, Lahore. Price Rs. 5.

This is the third edition of the law and practice of the Mofussil Small Cause Courts Act from the pen of a well-known author. Mr. Rustomji is widely known in this country to lawyers and judges for his valuable commentaries on various enactments and especially on the Indian Limitation Act. We are accustomed to associate with his name a not mere enumeration of cases but a critical analysis of them with often times the evolution of a principle. The commentary on the Provincial Small Cause Courts Act deals fully with the law and practice on the subject and it may be asserted that in bringing out this edition, he has carefully considered his conclusions expressed in the previous editions on the various topics. The various modifications in the enactment and the case-law up to December, 1926, have also been incorporated. We have no doubt that the book under review fully maintains the high level of the author's publications.

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SPECIFIC RELIEF ACT, by S. C. Sarkar, 5th Edition. Published by M. C. Sarkar & Sons, Calcutta. Price, Rs. 6.

The Specific Relief Act embodies the leading principles of equity with reference to contracts and injunctions without leaving us to find them out from the various English decisions and text books. A handy and upto date commentary on the Act is almost a necessity to practitioners and this is furnished in the volume under review by Mr. S. C. Sarkar who is already familiar to us as the author of the Law of Evidence and other works. Considerable portions of the book have been re-written with the result that it has increased by about 125 pages over the prior edition. The cases and the enactments have been carefully noticed in the commentary in their appropriate places. This edition is a distinct advance upon the previous ones and is therefore likely to be appreciated better.

V

THE INDIAN REGISTRATION ACT, by K. K. Vaidya, M.A., LL.B., Solicitor, High Court, Bombay. Price Rs. 3.

This is a book mainly intended for the students and the beginners of law who cannot start without a working acquaintance of the provisions of the Indian Registration Act and the leading decisions under it. The legislative amendments upto date and the cases upto the end of September, 1927, have been incorporated. The important bills pending before the Indian Legislature for amending the Registration Act are also noticed in the appendix to the book. We have no doubt that the book will be found useful by those for whom it is intended.

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THE CODE OF CIVIL PROCEDURE, 1908, by K. N. Katju, M. A., L.L.D., and S. C. Das, M. A., L. L. B. Published by Allahabad Law Journal Press. Price Rs. 4

There have been so may amendments both by the legislature and by the various High Courts under their rule making power that we are apt to be behind hand without an upto date edition of the Code. The present edition of the Code gives it as amended upto 1927, with all the rules made by the High Courts. The get up of the book is excellent and we are sure that it will be found useful.

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THE MADRAS ACTS, CRIMINAL, 1802-1927, by P. Hari Row, B.A., B.L. Published by T. A. Venkaswamy Row, B. A.

We have great pleasure in acknowledging the receipt of a copy of the Madras Acts, Criminal, 1802-1927, by Mr. P. Hari Row and published by T. A. Venkaswami Row, B. A.

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THE MADRAS CRIMINAL RULES OF PRACTICE by K. Jagadisa Aiyar. Published by M. K. Srinivasa Aiyangar. Price Rs. 3.

This is a publication of the Criminal Rules of Practice revised till the end of August, 1927. The book is divided into two parts; part 1 includes all rules of practice which may be called judicial rules passed by the High Court and part 2 includes the executive orders of the Government. The Editor has also appended to the various rules marginal notes, explanations and cross references. We have no doubt that the publication will be found useful by practitioners in the Criminal Courts.

POLICE DIARIES AND STATEMENTS (CIVIL AND CRIMINAL LAW SERIES) by M. K. A. Khan, K. S., M.A., L.L.M., Advocate, High Court, Lahore, and Public Prosecutor. 2nd Edition, 1927. Price Rs. 5-8-0.

This is the second edition of the useful publication giving a critical discussion of the provisions of S. 152 of the Criminal Procedure Code and S. 145 of the Evidence Act, with the case-law thereon of the various superior Courts in India and of the Privy Council. The subject is one of constant interest in the Criminal Courts and a work of this description is sure to be found helpful by all those having to deal with the practice of the Criminal Law in this country. The popularity of the work may well be judged by the circumstance that a second edition was called for in about a year after the first. The case-law has been brought quite upto date and considerable portions have been completely revised and re-written. In short the reader can find all useful information on the subject and the connected topics in the volume under review.

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GHOSH'S DIARIES, 1928.

We welcome the popular Ghosh's Diaries. They are issued in various sizes to suit the requirements of customers. The get-up is excellent.

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[END OF VOLUME LIII.]

THE
MADRAS LAW JOURNAL.

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## NOTES OF INDIAN CASES.

CHATTAR SINGH *v.* KAMAL SINGH, I L R 49 A 276 (F. B).

Pending an application for execution, an injunction was passed staying execution. After the disposal of the suit the application was struck off as upon a default of prosecution without notice to parties and within 3 years of the disposal of the suit, an application in the form of an execution petition was made for execution. The question was whether the application was barred. If S. 15 of the Limitation Act applied, the application would have been barred as deducting the period during which there was the injunction, the petition was more than three years from the last application. The Full Bench, we think rightly, considers that that section is confined to cases of fresh application and not to cases of continuance or revival. This proposition does not extend to saying that if there was a pending application for execution at the date of the injunction or stay the section would not apply. The section would apply when the particular application has been, after the dissolution of the injunction, properly disposed of and a fresh application for execution has got to be filed. There is a distinction between suits and applications for execution observable in the section appropriate to the nature of each. Whereas in the case of a suit, the section is available only in cases where the institution of the suit has been stayed, in the cases of applications for execution, it would apply even in cases where only execution is stayed, that is to say it would apply to cases where there is a pending execution and further proceedings have been stayed.

The only trouble about the decision that we feel is when the application has been pending till the disposal of the suit, how any further disposal proper or improper can bring into operation the doctrine of continuance or revival. At the time,

the obstruction was removed the application was pending. To a pending application, there could not be any question of applying any rule of limitation, nor could it be suggested that a party is at liberty not to take any further steps for 3 years after the removal of the obstruction and any disposal before the expiry of that period on the ground of the default of the party is *ultra vires*. We therefore think that a more satisfactory ground of decision would have been to say that the order "striking off" was unknown to law and the execution should still be considered pending and there is no limitation for carrying on a pending application for execution just as there is none to carry on a pending suit unless there is a definite provision of law requiring an application to which limitation might be properly applied. The point is well illustrated by contrasting applications to pass final decrees in mortgage suits with those to make final decrees in partition or partnership actions. The former are governed by limitation, the latter not. The law requires a definite application in the former case while none is contemplated in the latter.

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SHEOBARAN SINGH *v.* KULSUMUNNISSA, I L R 49 All 367: 52 M L J 658 (P C).

The question in this case was as to whether the custom of pre-emption avails against a sale by the Official Assignee in whom the property of the co-sharer has vested on bankruptcy. Their Lordships hold, it does.

Viscount Dunedin meets the argument of the Allahabad High Court that the custom which applies to voluntary sales by one co-sharer cannot apply to the case of an involuntary sale carried out against his wishes by a Court through a Collector or Official Assignee thus: "This overlooks one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. In every system of law the term may vary but in all there is an official, be he called an assignee or trustee or any other name and that official is, by force of Statute, invested in the bankrupt's property. But the property he takes is the property of the bankrupt, exactly as it stood in his person with all its advantages and all its burdens. . . . If the view of the learned Judges were right the bankruptcy of *A* would have the double effect of forfeiting something belonging to *B* and of rendering the property of *A* more valuable in the hands of his Official Assignee than it was in his

own". The distinction between sales in execution and sales by the Official Assignee is explained thus: "The Code of Civil Procedure arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights. Whenever a Statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the Statute." In construing clauses in leases restricting alienation the rule adopted is that *prima facie* a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law and who is under an obligation to assign. *Berbeak Permanent Benefit Building Society,* In re (1). But the position is not identical and the law is not necessarily logical.

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FAZAL KHAN *v.* THE CROWN, I L R 8 Lah. 136.

There is a conflict of authority on the question as to the proper construction of S. 439, cl. (4) of the Criminal Procedure Code (V of 1898). The decision under notice takes the view adopted by the Madras High Court in a considered judgment, in the case of In re *Bali Reddi* (2) and holds that the power of the High Court as a court of revision to alter the finding and enhance the sentence under the provisions of S. 439, cl. (1) is not taken away under S. 439, cl. (4) except in cases when there has been a *complete* acquittal of the accused. The Allahabad and Bombay High Courts, however, have taken a different view and hold that S. 439, cl. (4) applies to cases of partial acquittal also. See *Emperor* v. *Sheo Darshan Singh* (3) and *Emperor* v. *Shivputraya Durdundaya* (4). The Madras High Court also has recently followed this latter view in preference to the earlier one. See In re *Subba Chukli* (5). Some decisions hold that it is open to the High Court as a court of revision to enhance the sentence under S. 439, cl. (1) in cases of partial acquittal, only in cases where the High Court is at the same time exercising its appellate powers in an appeal against the conviction by the accused and that where there is no appeal by the accused, the High Court cannot enhance the sentence. *Kan Thein* v. *Emperor* (6). We do not see any justification

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1. (1913) 2 Ch 34.
2. (1913) I L R 37 M 119.
3. (1922) I L R 44 A 332.
4. (1924) I L R 48 B 510.
5. (1925) I L R 50 M 259 : 52 M L J 707.
6. (1926) I L R 4 Rang 140.

for this intermediate view. It will be noted that there is no doubt as regards the power of the High Court to order a re-trial. The only question on which there is a difference of opinion is whether the High Court can itself convict the accused in a proper case of the major offence of which he has been expressly or impliedly acquitted and enhance the sentence. The view taken in In re *Bali Reddi* (1) seems to be the sounder view, but in view of the numerous decisions to the contrary, it is desirable that the Legislature should make the matter clear by appropriate amendment of the terms of the section.

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ARJAN DAS *v.* THE CROWN, I L R 8 Lah. 196.

It is useful and interesting to note that this decision is an express authority for the position that a railway passenger can in a proper case make use of an alarm-signal for protection of valuable property, even though there is no apprehension of danger to the person. There is nothing in the language of S. 108 of the Railways Act to confine the use of the means of communication, only to cases where lives of passengers are endangered or to cases of theft with violence. Notwithstanding the statements usually found in Railway guides, it may not be an offence to stop the train in cases where valuable articles of a passenger are thrown out maliciously by a fellow-passenger as happened in the particular decision under review.

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BULLI GANGI REDDI *v.* BULLI TAMMI REDDI, I L R 50 M 421 : 52 M L J 524 (P C).

In this case, their Lordships take it for granted (the proposition was not questioned) that it is within the power of the Karta of a Hindu family to endow a small portion of the family property for the purpose of religious charity even without the assent of the other members and that this could be done without any instrument in writing. But for the appropriation to be valid, it must be by act *inter vivos* and not by will.

Their Lordships reversed the judgment of both the Courts below in this case which had inferred a dedication from the application of the income of a particular property to the charity. Their Lordships reject the inference from the fact that the entire income was not so applied and from the fact that for some time other income was being so utilised.

1. (1913) I L R 37 M 119.

SHRAVAN GOBA *v.* KASHIRAM DEVJI, I L R 51 Bom. 133.

We are not sure whether this decision has not disclosed a piece of inartistic drafting in the language of Ss. 19 and 19-A of the Indian Contract Act in so far as it purports to restrict the right of avoidance of contracts induced by fraud, misrepresentation or undue influence to those on whom such fraud, misrepresentation or undue influence has been exercised without extending it to their representatives in interest as well. There seems to be no reason to so restrict it as pointed out by the learned Chief Justice in this case. In England it has been held that in the case of fraudulent conveyances, the equitable title in the properties conveyed continues with the grantor and it can pass to his executors, devisees and trustees in bankruptcy who can avoid the conveyance and call in the legal estate. In this connection, it may be noticed that the language of S. 86 of the Indian Trusts Act, which applies to such class of cases could have been happier and more comprehensive as it lends itself to the suggestion that in cases of conveyances liable to rescission, the property should be held for the benefit of the *transferor* on the receipt of a notice of rescission by him. In this state of difficulty on the language of the sections, the learned Judges had necessarily to rely on the doubtful ground of S. 88 of the Trusts Act which it is not easy to apply to this case as the learned Chief Justice has negatived any antecedent fiduciary relation between the parties. S. 35 of the Specific Relief Act which answered the purpose in the present case cannot in terms apply to cases of oral contracts voidable for fraud, etc. Again the other sections of the Indian Contract Act referring to the rights and liabilities of the representatives of contracting parties alluded to by the learned Chief Justice in this case as showing the intention of the legislature are by no means an uncertain guide as they may lead to the contrary inference on the principle of *expressio unius* as suggested in *Govind Ramaji* v. *Savitri* (1). The most satisfactory solution will therefore be for the legislature to clear up the language, in the absence of which we must take it that even though the language is inapt, the intention of the legislature is as pointed out by the learned Chief Justice in this case.

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1. (1918) I L R 43 B 173.

HIRABAI JEHANGIR *v.* DINSHAW EDULJI, I L R 51 Bom. 167.

Once it is recognised that it is not the entire body of rules of the English Common Law that are applicable to the Parsis in Bombay but it is possible to discriminate between the rules under the limitation of what are "just and right," it would have been simpler and more intelligible to have rested the decision in the case by doing away with the requisite of special damage in the cases of slander of all kinds to render them actionable. The rule of English Common Law by which damage is assumed and not required to be proved in some specified cases of slander and that in other cases, damage flowing out of the slander has to be specifically proved has been held to be illogical, artificial and devoid of principle by the Court of Appeal in England in *Jones* v. *Jones* (1) and by Lord Wrenbury in the House of Lords in the same case on appeal in *Jones* v. *Jones* (2) though Lord Sumner would seem to think that the distinction is based on principle though not ideally logical. The growth of this branch of law in England and its limitations rest on historical accidents relating to ecclesiastical courts, as pointed out by Lord Haldane, which have no relation to this country. If the ground of the decision of the learned Judges in this case is right, it would seem to follow that if the imputation of immorality were made of an unmarried woman, the slander would not in such a case be actionable *per se,* a state of law which even in the words of English Judges has been styled as unsatisfactory, cruel and even barbarous [*Lynch* v. *Knight* (3), *Roberts* v. *Roberts* (4), see also *Parvathi* v. *Mannar* (5)] and which has since been rectified in England by legislation. Again the ground of decision adopted by the learned Judges in the decision under notice is by no means simple in its application to the case, as each one of the questions whether the act should be criminal according to the English law or Indian law, or whether it should be an offence under the Indian Law of 1823, the date of the charter or of the present day and whether adultery is at all an offence on the part of the married woman even at the present day in India, is by no means clear. With all this, there will still remain the anomaly that on this decision a slander imputing immorality to a Parsi unmarried lady in the moffusil would be actionable *per se* while in the City of Bombay it would not be so actionable.

1. (1916) 1 K B 351. 2. (1916) 2 A C 481.
3. (1861) 9 H L C 577 at 594. 4. (1864) 5 B & S 384 at 389.
5. (1884) I L R 8 M 175.

ABDUL RAHMAN *v.* KING-EMPEROR, I L R 5 Rang. 53 : 52 M L J 585 (P C).

MUKAND SINGH *v.* KING-EMPEROR, I L R 8 Lah. 230 (P C)

These two decisions of the Privy Council considerably narrow the scope of the application of the principle laid down by the Judicial Committee itself in the well-known case of *N. A. Subramania Aiyar* v *King-Emperor* (1). It must now be taken that disobedience to an express provision of law as to a mode of trial is not sufficient by itself to vitiate the conviction. Their Lordships explain their previous decision in *N. A. Subramania Aiyar's Case* (1) as a case where the Court adopted a procedure which the Code *positively* prohibited and where it was possible that such procedure *might* have worked actual injustice. The first of the two decisions noted above also lays down that the well-established practice of the Privy Council limiting the jurisdiction of the tribunal in criminal appeals to interference "only where substantial and grave injustice is done, either by disregard of forms of legal process or by some violation of the principles of natural justice or by similar cause" [see *In re Dillet* (2)] is equally applicable to appeals which have been entertained by special leave. It was the application of this principle that led to the dismissal of the petition for special leave in the second of the two cases. Though their Lordships do not give any reasons, it must also be taken that, in their opinion, the decision in *Subramania Aiyar's Case* (1) was not applicable to the facts before them as the offence of conspiracy under S. 120-B, Indian Penal Code, was newly created only by Act VIII of 1913. The conviction for the first charge of conspiracy was therefore sustained, the other charges being merely taken as overt acts to prove the conspiracy alleged.

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BHIM SINGH *v.* LIQUIDATOR, UNION BANK OF INDIA, I L R 8 Lah. 167.

The soundness of this decision is open to question. We think that the view of the Allahabad High Court in *In the matter of the Union Bank, Allahabad, Ltd.* (3), from which the decision under notice expressly dissents, is more in consonance with the intention of the Legislature. The result of holding that the application for compensation, for misfeasance, etc., on the

1. (1901) I L R 25 M 61 : 11 M L J 233 (P C).
2. (1887) 12 App. Cases 459. 3. (1925) I L R 47 A 669.

part of directors or other officers of a company under S. 235 of the Indian Companies Act (VII of 1913), is governed by Art. 36 of the Limitation Act and that time begins to run from the date of the alleged misfeasance is to nullify the scope and usefulness of the remedy that is provided. The misapplication or misfeasance may not, in the majority of cases, be discovered at all within two years. Apart, however, from the policy of the Legislature, it is difficult to see how the liquidator's rights can be taken away even before his appointment. It is true that S. 235 does not create new rights which did not exist before, but that dictum must be understood only with reference to the substantive rights and obligations of the delinquent parties and it does not bear on the question of the starting point for limitation. The decision of the Court of Appeal in *In re City Equitable Fire Insurance Company, Ltd.* (1) is not an authority on the question of limitation. That case merely decided that if an officer of the company was not liable under the Articles of Association except for wilful default, the plea was available to him as a defence to a "misfeasance application" just as it would have been a proper defence in an action by the company itself. The extent of liability is not wider in the former case. The question of the starting point of limitation is however different, where the liability is otherwise established. It was held under the Indian Companies Act of 1882 that there was no limitation applicable to such applications. See *Ramaswami* v. *Streeramulu Chettiar* (2) and *D. Connell* v. *Himalaya Bank, Ltd.* (3). S. 214 of Act VI of 1882 no doubt did not contain a clause similar to cl. (3) of S. 235 of the present Act (VII of 1913). The result of the change is to make Art. 120 of the Limitation Act applicable to such applications as otherwise they might be governed by Art. 181 of the Limitation Act which now governs applications not merely under the Civil Procedure Code but other Acts as well. The object of the Legislature was presumably to extend the period from three years to six years. It is well settled that limitation cannot commence to run when there is no person competent to sue or apply. Reference may be made to the observations of the Privy Council in *Meyappa Chetty* v. *Subramaniam Chetty* (4). It cannot be that the right to obtain relief under S. 235, cl. (1) is barred even before the date of the order for winding up.

1. (1925) 1 Ch 407.
2. (1896) I L R 19 M 149.
3. (1895) I L R 18 A 12.
4. (1916) L R 43 I A 113 (P. C).

RAM GOPAL MARWARI *v.* BENGAL AND NORTH-WESTERN RAILWAY COMPANY, I L R 6 Pat. 256.

Under S. 77 of the Indian Railways Act (IX of 1890) a claim against a Railway Administration for compensation for loss of goods during transit must be preferred in writing within six months from the date of delivery of the goods. S. 140 of the same Act allows a notice to be served by forwarding it by post in a registered pre-paid letter. The question in the above case was about the validity of the claim where the notice was posted within six months but was actually received by the agent in the usual course of delivery only after the expiry of the six months period. It was held that the claim was preferred as contemplated by S. 77 when the letter was posted. We have doubts about the correctness of the decision. The conclusion seems to have been reached by assuming that service by post is the only authorised mode of preferring a claim. This is obviously wrong as S. 140 itself provides for other methods of service of notice. It may also be pointed out that the judgment does not refer to S. 142 which has a direct bearing on the point under discussion. In cases where a party chooses to send in his claim by post, it must be deemed to have been preferred only at the time when the letter containing it would be delivered in the ordinary course of post. This must be ascertained as a question of fact in each case and this will not necessarily be either the day of posting of the letter or the day of the actual delivery of the same to the addressee.

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ABADI BEGUM *v.* KANIZ ZAINAB, I L R 6 Pat. 259 : 52 M L J 430 (P C).

One of the essential conditions for the validity of a wakf under the Shiah Law is the transfer of possession of the endowed properties from the settlor to the trustee or mutawalli. Where the settlor appoints himself as the first mutawalli, no change of possession is physically possible but none the less it is incumbent on the settlor to give such possession as the case admits. The observations of their Lordships as regards the necessity for a change in the character of possession are noteworthy. It would seem to be necessary according to their Lordships that there should be a mutation of names in the public registry evidencing the change in the holding of the endowed lands by the wakif not in his original capacity of

owner but in his capacity of mutawalli. Their Lordships held in the above case that the wakf was invalid, as there was no such change of possession and mutation of names in the revenue papers notwithstanding the long lapse of time and more especially because of the failure of the wakif to effect the necessary change during re-settlement proceedings. It should not be understood, however, that the absence of such a mutation of names is always conclusive on the question of "transfer of possession." Such an omission is generally significant and would ordinarily go very far to negative a change of possession. But this is only one of the circumstances that bear on the question and may in proper cases be capable of an explanation. We do not think that the Privy Council intend to lay down that the absence of mutation of names is by itself fatal to the validity of the wakf. Nor does the decision in *Hamid Ali* v. *Husain Khan* (1) to which their Lordships refer, go to to that extent.

In the particular case, the wakf would also be invalid as the wakif had reserved an interest in herself out of the income of the wakf properties over and above what might have been legally reserved as remuneration to herself as mutawalli. The Shiah Law is perfectly clear on the point and does not allow "the wakif to eat out of the wakf". Notwithstanding the somewhat cautious reservation by their Lordships of their final decision on the point, it must also be taken that in such a case of even a partial reservation of benefit by the settlor in her favour, the wakf will be wholly void and cannot be regarded as valid to the extent of the unreserved dedication.

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ASKARI HASAN *v.* JAHANGIRA MAL, I L R 49 All. 297 (F B).

The view taken by the Full Bench of the Allahabad High Court in this case is that when a compromise decree provides for payment of a certain amount in instalments and not on a fixed date, that is to say within six months from the date of declaring the amount, O. 34, R. 5 does not apply and no application for a final decree is necessary. This is in accordance with the view of the Calcutta High Court in *Bechu Singh* v. *Bicharam Sahu* (2). The true basis of the decision is as pointed out by Mr. Justice Mukherjee in *Biswanath Prasad* v. *Bhagwandin Pandey* (3) that it is open to parties to waive a final decree and a decree for payment in instalments without

1. (1902) I L R 24 A 257.
2. (1909) 10 C L J 91. 3. (1911) 14 C L J 648.

fixing the date involves such waiver. We do not quite see that an instalment decree should necessarily lead to such inference. The decree might direct payment within six months and direct sale on failure, in which case, there is no need to infer that the parties agreed to waive the final decree. The extreme view taken in *Abir Pramanik* v. *Jahar Mahmud Mandal* (1) that the procedure of O. 34, R. 5 is excluded in the case of consent decrees seems also to be unjustified. The whole question, we think, should be whether or not the parties agreed to waive a final decree. If that is the right inference on the wording of the compromise decree a further final decree is unnecessary; otherwise, it is necessary.

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SUKHBIR SINGH *v.* MANGEISAR RAO, I L R 49 All. 302.

The point in this case was as to whether the custom of Swayamdatta adoption was proved. It was held that such a custom was not established by showing that the Gwalior Durbar allowed such adopted sons to succeed to jaghirs if the adoption took place with their sanction. The Hindu Law being personal law, it might be open to the Gwalior Maharaja in his sovereign capacity to alter the law as to jaghirdars there being no clear distinction between legislative and executive functions of the Sovereign in these States. But no such thing could be predicated in a case like the present. The Gwalior Durbar did not purport to vary the rule of Hindu Law so far as such families were concerned. It only recognised the title of such adoptees if it chose.

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ALI BAHADUR *v.* RAFI-ULLAH, I L R 49 All. 310.

Obviously there must be a slip in the headnote in this case. The Judges seem to follow the Madras view that O. 22, R. 4. applies to mortgage suits in the stage after the preliminary decree and before the final decree. The view leads to serious hardship such, we think, as to require legislative interference. The Privy Council held in a recent case that a suit for partition could not be dismissed after preliminary decree has been passed. The same argument is applicable to mortgage suits after a preliminary decree for sale and it is quite open to argument that the right is no longer a mere right to sue but a right to have the decree carried out though it might not be execution as understood by the Civil Procedure Code.

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1. (1907) I L R 34 C 886

NARAIN DAS *v.* CHIMMAN LAL, I L R 49 All. 321.

The words "suspended payment" would seem to be a technical term and involve an intention to stop payment to everybody and not merely to one particular creditor either because liability to him is denied or for any other reason good or bad.

But we do not quite see why the Court cannot act under S. 56 and direct the receiver to make good any loss sustained by it by his wilful negligence or gross default. In the case of ordinary receivers in suits the Court does not become *functus officio* in this matter when for instance the suit is dismissed and as such the receivership comes to an end. A different conclusion is not necessitated in either the language of S. 56 or by general considerations.

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LACHMI CHAND *v.* LACHHO, I L R 49 All. 334.

Three views are possible as regards the effect of surrender by a widow after alienation: (*i*) The surrender sweeps away the alienation. (*ii*) It is not competent to her to surrender after having alienated the properties. (*iii*) The surrender is subject to the alienations made, that is to say that they are good for her life-time.

Mr. Justice Page of the Calcutta High Court thought that the first was the right conclusion and on principle Mr. Justice Sulaiman feels inclined to that view but having regard to the trend of authorities he held the contrary. Boys, J., was in agreement with the general course of decisions. Mr. Justice Kumaraswami Sastri who took this view in *Vaidyanatha Sastri* v. *Savithri Ammal* (1) based the conclusion on the fact that surrender is more or less a creature of judicial decisions and that it is open to Courts to impose conditions on its validity so as not to affect previous alienations. It might be open to comment that this line of argument is not applicable to gratuitous alienations but as gratuitous alienees might have made subsequent alienations for value, any such distinction would lead to further subtleties very much to be deprecated in an already over-complicated branch of law, thanks very largely to judicial decisions.

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1. (1917) I L R 41 M 75 : 33 M L J 387 (F.B).

BHUBAN MOHAN SINHA *v.* RAM GOBINDA GOSWAMI, I L R 54 C. 179.

The learned Judges have held in this case that the payment of interest by a purchaser of the equity of redemption will save time not only against himself but also against the mortgagor under S. 20 of the Limitation Act. The point is fairly well settled in this country and in England where after the decision of the Court of Appeal in *Lacey In re, Howard* v. *Lightfoot* (1), the question is no longer open to doubt. It must be noticed, in this connection, that the language of S. 19 of the Indian Limitation Act regarding the person by whom the acknowledgment has to be made for the purpose of enlarging time is more restricted in its scope than that of S. 20 (1) relating to the payment of interest. It may be mentioned here that so far as the English Law is concerned, no difference has been recognised between the persons by whom an acknowledgment can be made and those by whom a payment of interest can be made for the purpose of saving limitation. See *Read* v. *Price* (2). Coming to the expression used in S. 20 (1) "the person liable to pay the debt, etc.," it is substantially the same as the words used in the English statute regarding acknowledgments which are "the person by whom the same shall be payable" in S. 8 of the Real Property Limitation Act of 1874. That both the expressions have the same meaning was laid down by Farwell, L. J., in *Lacey In re, Howard* v. *Lightfoot* (3). Again the expression "by whom the same was payable" has been held to be one of extended signification not merely denoting the persons who are legally bound by contract to pay the interest, but all persons against whom the payment may be enforced by any action or suit and by whom interest may be payable as in a redemption suit. See *Bolding* v. *Lane* (4). To the same effect were the observations of Buckley, L. J., as he then was, in *Lacey In re, Howard* v. *Lightfoot* (5) where the learned L. J. observes after referring to *Roddam* v. *Morley* (6) that it refers to all others as well who could be reached for the payment and the case before the Court of Appeal was one where the payment of interest by a devisee of the charged property was held to save time even against devisees of uncharged properties. So, seen from every point of view, the conclusion of the

1. (1907) 1 Ch 330.
2. (1909) 2 K B 724 (C. A.).
3. (1907) 1 Ch 330 at 345.
4. (1863) 1 De J & S 133.
5. (1907) 1 Ch 330 at 354.
6. (1857) 1 De G & J 1.

learned Judges in the case under notice is the only one possible in the law. We would in this connection draw attention to a very thoughtful article considering all the aspects of the question in 32 M L J 1 (Journal) and continued in 34 M L J 31 (Journal) where all the English and Indian statutes and decisions are reviewed and discussed.

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GANESH TAVANAPPA *v.* TATYA BHARMAPPA, I L R 51 B. 236.

The learned Judges have held in this case that when a plaint is filed in an inferior Court by undervaluing the claim and paying a deficient court-fee and on objection raised by the defendant it is found that an insufficient court-fee has been paid and that if the suit is properly valued and proper court-fee is paid, the suit will have to go before a higher Court, the inferior Court has no jurisdiction to call for the additional court-fee or dismiss the suit under S. 10 of the Court-Fees Act and that its only power is to return the plaint for presentation to the proper Court. Notwithstanding the full consideration which the question has received by the learned Judges, we are not clear that their conclusion is more acceptable than that laid down in the observations in *Kandasami Goundan* v. *Subbai Goundan* (1) though it must be admitted that it does not appear that the question was considered in the latter case with reference to the provisions of the Court-Fees Act. It seems that on a close reading of Ss. 6, 9, 10 and 28 of the Court-Fees Act, the better view is that adopted by the single Judge in the Madras case. When a plaint is sought to be filed in a court, S. 6 requires that the proper court-fee must be paid on it before it can be filed by the court. If, however, the court files it by mistake or inadvertence, the judge may order under S. 28 that it should be stamped as required by law. If the court has reason to think that the market value or the nett profits on which the fee has been paid has been wrongly estimated, the court to which the plaint is presented is empowered under S. 9 to investigate into the question. If as a result of the investigation, such court finds that the amount has been wrongly stated in the plaint, the court which made the investigation and to which the plaint was presented is empowered to call for the additional court-fee payable thereon within a time to be fixed

1. (1923) 46 M L J 345.

by it and on the failure of the plaintiff to pay the same, it is provided by S. 10 that the suit shall be dismissed. We venture to submit that the action contemplated all along the process is that of the court to which the plaint is presented for filing which is referred to as "the court" in both Ss. 9 and 10. If so, it seems clear that the dismissal contemplated is by that court under sub-section II of S. 10. There is nothing to warrant the reading in of words "having jurisdiction to try the suit" into any one of the sections referred to. If, as a result of the proper valuation being placed on the suit, it turns out to be beyond the pecuniary limits of the receiving court, it has always the power and is under a duty to return the plaint for presentation to the proper court and the party would lose nothing as the court-fee would be given credit for in the proper court as laid down in *Visweswara Sarma* v. *Nair* (1) and *Prabhakar Bhat* v. *Vishwambhar Pandit* (2). After all, the whole question reduces itself to the consideration as to the court which has to collect the fee due to the crown on the plaint and the scheme of the Act points to its being the court receiving the plaint originally having the power to collect it. There seems to be no hardship or inconsistency with the provisions of the Civil Procedure Code, in construing the provisions of the Court-Fees Act according to their apparent tenor.

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KRISHNAMURTHI *v.* KRISHNAMURTHI, I L R 50 M. 508 : 53 M L J 57 (P C).

This is a case of the very highest importance: It settles a point which has been the subject of several Full Bench judgments. The question is as to how far arrangements made with the concurrence of the natural father of an adopted son prior to adoption are binding on him. The conclusions arrived at by their Lordships may be summarised as follows: If the arrangements take the form of dispositions *inter vivos* before the adoption and are made by the adoptive father they are absolutely binding and apart from any concurrence on the part of the natural father. Similarly even if the dispositions are by will, if the adoption by the widow is by force of the authority given in the will, the dispositions are equally binding because the dispositions take effect before the adoption. There too

1. (1911) I L R 35 M 567 : 21 M L J 533 (F B). 2. (1884) I L R 8 B 313.

the consent of the natural father is immaterial. Arrangements by adoptive father by means of a will which would come into effect only after adoption (the adoption being by himself during his life-time) or arrangements entered into by the widow when adopting a boy would be binding:

(i) If the arrangement is for making provision for the widow during her life-time even though the interest of the adopted son is postponed till after the life-time of the widow;

(ii) and if it has the assent of the natural father to it, such assent being regarded as evidence of its reasonableness. If the arrangements involve the creating of absolute rights in the widow or in strangers, the arrangement would not bind the adopted son though it may have been assented to by the natural father and might otherwise be reasonable or proper.

Arrangements by will are somewhat of an anomaly for the obvious reason that they can be revoked by the testator but they seem to be valid according to their Lordships if they are designed for the limited purpose indicated above. As the whole thing seems to be supported on the basis of custom, the question as to how it would fit in with the general theory as to the incapacity to make wills becomes immaterial.

We have had a somewhat similar divergence of view as to the legal possibility of the karnavan renouncing his position as karnavan the doubts finally being resolved in favour of the existence of such power. Here it has been the other way about.

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SRI THAKURJI *v.* JAIKALI KUNWAR, I L R 49 All. 329.

Difference between slow erosion and accession to another estate on the one side and violent carrying away of a portion of the estate and reformation *in situ* is very well recognised. While in the one case the owner loses his rights in the other he regains his as soon as the land re-appears.

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NINGAPPA MARBASAPPA *v.* GYANAJI POMAJI, I L R 51 Bom. 231 AND LAKHMIDAS AND CO. *v.* SIR D. J. TATA, I L R 51 Bom. 247.

After the enactment of Act II of 1927 by the Indian Legislature which was intended to nullify the decision of the Privy Council in *Dayal Singh* v. *Indar Singh*(1) the confusion caused by that decision is at an end and if the case under notice came up later, it would not have been necessary to consider or specify the limits of the rule laid down by the Privy Council in that decision. It will also serve no useful purpose to bring out the fallacy underlying it. No doubt as the learned Judges were constrained to do in *Ningappa Marbasappa* v. *Gyanaji Pomaji* (2), if the decision of the Privy Council had stood by itself, the Courts in India would be bound to follow it whatever their own view on the question may be. There can be no doubt that the enactment is retrospective in its operation, by reason of its express provisions and its remedial character, if not also because it affects procedure as its effect is to affect documents being given in evidence under S. 49 of the Registration Act. It would still be a question how far the retrospectivity will affect the final decisions given before the amendment of the Registration Act. Compare *Guardians of Bath Union* v. *Guardians of Berwick-upon-Tweed Union* (3).

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VEERABHADRAYA *v.* ZAMINDARS OF VALLUR, I L R 50 M. 201 : 52 M L J 38.

Whether land once proved to have been ryoti land can become private land is a question over which opinion seems to be sharply divided; on one side we have Sir John Wallis, C. J. in *Zamindar of Chellapalli* v. *Somayya* (4), Napier, J., in *Zamindar of Nuzvid* v. *Lakshminarayana* (5) and Spencer, J., on the other we have Mr. Justice Seshagiri Aiyar in *Zamindar of Chellapalli* v. *Somayya* (4), Mr. Justice Sadasiva Aiyar in *Zamindar of Nuzvid* v. *Lakshminarayana* (5) and Abdur Rahim and Burn, JJ., in *Sreemantha Raja Yarlagadda Mallikarjuna Prasada Naidu* v. *Subbiah* (6). In this Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao throw in their weight with the former. Whether the one view is right or the other, there is no question that there can be no such conversion

1. (1926) L R 53 I A 214 · 51 M L J 788 (P C).
2. (1926) I L R 51 B 231. 3. (1892) 1 Q B 731 at 734.
4. (1914) I L R 39 M 341: 27 M L J 718.
5. (1921) I L R 45 M 39· 42 M L J 161.
6. (1919) 39 M L J 277.

after 1st July, 1898. That seems to be common ground. In S. 185 the Legislature has clearly indicated that evidence of letting as private land after that date is of no avail for showing that the land is private land; in other words, the dealing if it all to be effective, must be before that date. The Judges that hold the view that there cannot be such conversion at all rely mainly on the indication afforded by this section and S. 8 which enacts that whenever before or after the Act the entire interests of the land-holder and the occupancy ryot have become united in one person such person shall have no right to hold the land as a ryot but shall hold it as landholder. The reply given on the other side is that even private land is held by the landholder as such and not as a ryot. The only restriction recognised on other side is that indicated by S. 185. But for S. 185, their Lordships would have been prepared to hold one should fancy, that the conversion could have taken place even after the Act. The Act is so badly drafted that it is impossible to say what the Legislature had in mind when enacting this or that section and it is hoped that the matter will be made clear when the work of revision of the statute is taken up.

The difference between ryoti land and private land is that while letting-out is the mode of enjoyment of the former, private cultivation is the mode of enjoyment of the latter, letting being only temporary. While there is so much difference of opinion as to the possibility of conversion of ryoti land into private there is none as regards the legal possibility of the reverse process. When the reverse is set up, it is open, according to their Lordships, to rebut the contention by producing leases subsequent to 1908 that show clear indication of an intention to retain the old character. Whether protestations to the contrary notwithstanding, land which has been for considerable period of time let to tenants without any disclosed or provable intention of resuming private cultivation should not be regarded as having shed its original character of private land, is a question which might have but has not been raised.

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RAMAN CHETTIAR *v.* TIRUGNANA SAMBANDAM, I L R 50 M 217 : 51 M L J 869.

While noticing *Nallaka Venkatasami* v. *Rajam Viranna*(1) we pointed out that the decision was not reconcilable with the judgment of the Privy Council in *Gangapershad Sahu* v. *Maha-*

1. (1921) I L R 45 M 429 · 42 M L J 333.

*rani Bibi* (2) and that is the view which the Bench in this case takes. The alienee is entitled to act upon the sanction by a competent Court unless of course he was himself guilty of fraud or underhand dealing. If he was himself aware of very relevant circumstances which to his knowledge have not been placed before the Court the sort of fraud upon the Court to which Garth, C. J., refers in *Sikher Chund* v. *Dulputty Singh* (3), whether the minor could avoid the sale is doubtful.

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VIBUDHAPRIYA THIRTHA SWAMIAR *v.* LAKSHMINDRA THIRTHA SWAMIAR, I L R 50 Mad. 497 : 53 M L J 196 (P C).

It is usual for the Pariyaya Mutt at Udipi to feed the Brahmin pilgrims visiting the place and this process sometimes involves borrowing. Krishnan and Ramesam, JJ., ruled that such feeding was not compulsory, and that it was the duty of the Matadhipathis to keep within the limits of their available income and that the lender had no right to proceed against the succeeding head for the debt. While not disagreeing from the learned Judges that feeding might not be compulsory in the sense they could not stop it, seeing that they could not do so without violence to popular sentiment their Lordships upheld the borrowing. Say their Lordships "what their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and feeding of pilgrims and secondly, whether the moneys borrowed were legitimately applied for those purposes." The decision cannot be said to have laid down any new principle but their Lordships substitute for the strict cast iron sort of rule laid down by the learned Judges a somewhat elastic and less rigid rule. The test is not whether the Swami was bound to act in the manner he did—the question rather is whether it was proper for him to have so acted—a rule which is applied in the case of minors. Guardians occasionally borrow for the marriage of the minors. If the test applied by the learned Judges to Mutts were applied to such borrowings the borrowing could under almost no circumstances be justified. What one may call the *necessary* expenditure at a marriage could not come to more than a few rupees. The rest is customary expenditure, expenditure which ordinary people consider properly incurred in connection with marriage. Their Lordships dissent from the criticism of

2. (1884) I L R 11 C 379 (P C).
3. (1879) I L R 5 C 363.

Justice Ramesam on reliance upon custom or ancient practice as justification for the course adopted by the Swami.

A portion of the borrowing in the case was for re-building the dining hall connected with the Krishna Temple. The learned Judges were very meticulous as to the comparative size of the old and new buildings and disallowed the expenditure on the ground that though the rebuilding might be necessary, enlarging the building could not be considered a necessity. This aspect of the case did not appeal to their Lordships, very rightly we should think. If rebuilding was a necessity, the mere fact that the new buildings were slightly bigger than the old or more substantial than the old could not affect the question. It is possible of course to be culpably extravagant but short of that, to meticulously weigh the old and the new proportions is, we think, as their Lordships apparently hold, not justifiable

Their Lordships direct however that the decree should be against only the incomes of the Mutt. Though as early as *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1) their Lordships adopted this course and in *Srimath Daivasikamani Pandara Sannadhi* v. *Noor Mahomed Rowthen* (2) that kind of decree was passed and in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (3) Mr. Justice Subramania Aiyar specially emphasised that that is the only sort of the decree that can ordinarily be passed. A somewhat discordant note was struck in *Sreemath Daivasikamani Pandara Sannadhi* v. *Palaniappa Chetty* (4) and it is gratifying to find the Privy Council emphasising that that is the decree that should be passed both in this case and in *Niladri Sahu* v. *Mahant Chaturbhuj Das* (5). Their Lordships pass a decree in these terms "The Trial Court should appoint a Receiver for the rents and issues of the Mutt proper and the proceeds from offerings, etc., and after payment of the expenses connected with the Mutt and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi, the balance should be applied in discharge of the plaint debt". On the one side, it provides sufficient check on prospective lenders and on the other it affords reasonable protection for honest creditors who if their claims are reasonable have a not unremote chance of realising their dues.

1. (1875) L R 2 I A 145. 2. (1907) I L R 31 M 47: 17 M L J 553
3. (1903) I L R 27 M 465 at 472: 14 M L J 81 (F B).
4. (1910) I L R 34 M 535 : 20 M L J 969.
5. (1926) I L R 6 Pat. 139 · 51 M L J 822 (P C).

ARUNACHELLAM *v.* DAVID, I L R 50 M 239 : 51 M L J 671.

The distinction made in this case between a completed act and a threatened act restricting the operation of S. 80, C. P. C., to cases of completed acts can no longer be sustained in view of the latest pronouncement of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India* (1).

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MAHOMED KASSIM & CO. *v.* SEENI PAKIR BIN AHMED, I L R 50 M. 261 : 52 M L J 240 (F. B.).

There are two clauses of S. 13, Civil Procedure Code; one says that a foreign judgment which is not passed on the merits cannot be sued upon; another that a judgment which is opposed to natural justice cannot. A judgment passed on default of appearance by the defendant without any evidence being taken, it was contended in this case, came within the first clause and accordingly could not be sued upon and the Full Bench upheld the contention overruling *Janoo Hassan* v. *Mahamad Ohuthu* (2). In England, such a judgment can apparently be sued upon. Here in India, the first clause above referred to has been held by the Privy Council in *Keymer* v. *Viswanatham Reddi* (3) and *Oppenheim and Co.* v. *Mahomed Haneef* (4) to bar suits upon such judgments. The distinction made in *Janoo Hassan* v. *Mahamad Ohuthu* (2) between a case where the defendant might have if he pleased set up a defence and the case where the defence was made and was struck out was not accepted by the Full Bench. If without notice at all, the decree is passed, then it would offend the next clause, that is to say, it would be against natural justice as some judgments *in absentia* of the French Courts under French Procedure have been held to be. Mr. Justice Venkatasubba Rao is of opinion that whether the decree is passed *ex parte* after taking evidence or without, the result is the same. Here Mr. Justice Krishnan does not agree with him. We should think that a judgment rendered on evidence produced by the plaintiff though no doubt in the absence of the defendant owing to the latter's default, cannot be said to be not delivered on the merits of the case. It may be a decision rendered after an inadequate trial but it cannot be said to be a decision not on the merits at all.

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1. (1927) P C 176 : 53 M L J 81 (P C).
2. (1924) I L R 47 M 877 : 47 M L J 356.
3. (1916) I L R 40 M 112 : 32 M L J 35 (P C).
4. (1922) I L R 45 M 496 ; 43 M L J 422 (P C).

SOGAIMUTHU PADAYACHI *v.* KING-EMPEROR, I L R 50 M 274.

One question that arose in this case was as to the admissibility of a statement of the accused that he buried the *stolen* property somewhere when he himself points out the property. On this point all the three Judges seem to be agreed that the whole statement is admissible and could be used to show both that the property is stolen property and that it was buried by him. S.27 says: "Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer so much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved." It is obvious from the language of the section that the whole information that precedes or leads to the discovery is not admissible but only so much "as relates distinctly to the fact thereby discovered". To start with, something must be discovered by the statement. When the accused himself produces a thing after making the statement, can it be said that it is a discovery by reason of the statement. The discovery is his own act and not necessarily connected with the statement. That apparently is the view taken in an earlier case in Criminal Law Journal referred to in the judgment of Mr. Justice Devadoss. But any act of the Police intervening between the statement and the finding would be sufficient to make it a discovery. Their asking the accused to produce it and his producing it for instance would make it a discovery by the Police so that we agree that there is not much point in the distinction made unless it could be said in any particular case that the whole thing, the statement and the production is a voluntary act of the accused without any persuasion or pressure from the Police a somewhat rare and improbable event.

As regards the portions of the statement that would be admissible also there is some difference of opinion. It is a bad state of affairs that the admissibility of a statement should depend upon the construction of the sentence uttered. For instance, if the statement ran thus: "I shot the man with a revolver and I have hidden the revolver in the dungheap" the statement may not be admissible as to shooting, but if he said "The revolver with which I shot the man is here" the whole statement would be admissible. The construction of the sentence in the vernacular is so often different from that in English

and the exact words uttered by the accused are difficult to be reproduced. A more satisfactory rule is desirable. The important question on which the Judges differed in this case was as to whether the possession of certain properties alleged to have been stolen from the mutt by the deceased and admitted by them to be *stolen* property was sufficient evidence to find them guilty of murder. It cannot be said that there was much difference between the Judges as to the principle of law applicable. The question was more of appreciation of evidence. The ultimate conclusion of Mr. Justice Spencer was that there is nothing to show that the murder and the theft were parts of the same transaction and that in the absence of such evidence possession of stolen goods would not be evidence of murder. Possession of stolen goods unaccounted for might be evidence of theft or receipt of stolen property but the inference of murder from such possession even if murder and theft are parts of the same transaction is somewhat violent and though there is nothing in the Evidence Act to restrict the Court to any particular kind of evidence one can well appreciate the hesitation shown by the learned Judges in basing any conclusion as to murder on such possession.

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KANNAN *v.* AVVULLA HAJI, I L R 50 M. 403 : 52 M L J 1.

On the question as to whether there can be a step-in-aid of execution when there is no pending application for execution, conflict seems to be thickening. On the one side we have this case and *Sankara Nainar Pillai* v. *Puthiya Veettil Thangamma* (1) and C. M. A. No. 120 of 1923; on the other we have *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (2) (Ayling and Venkatasubba Rao, JJ.) and C. M. S. A. No. 170 of 1925 (Wallace and Thiruvenkata Achariyar, JJ.). We must confess, we prefer the view taken in the former set of cases.

The other point in this case was as to whether an application for delivery of possession by a decree-holder-purchaser under O. 21, R. 95 is a step-in-aid of execution of the decree. The argument of the Allahabad High Court in *Moti Lal* v. *Makund Singh* (3) on this matter proceeds thus: Taking possession is as much a step-in-aid of execution as taking out

1. (1921) I L R 45 M 202 : 41 M L J 374.
2. (1921) I L R 45 M 466 : 42 M L J 303.
3. (1897) I L R 19 A 477.

the sale-proceeds. If the latter is a step-in-aid, why not the former? The Calcutta High Court, curiously enough, does not accept the position that taking out money is a step-in-aid but on the point in question seems to agree with the High Court of Allahabad in *Sariatoolla* v. *Raj Kumar Roy* (4). They argue that a step-in-aid of execution may be as much in aid of an execution that has taken place as in aid of an execution that has to take place. The Madras High Court has been of opinion that both application to take out the sale-proceeds and application for delivery of possession are steps-in-aid which seems to be a logically consistent position. As regards the former, the argument of the Punjab as well as the Calcutta Courts is there would be no limitation for the decree-holder applying to take out money and is the decree to be revived by such applications at any time? But that is overlooking that the decree is to be kept alive by some application within 3 years and a barred application cannot be revived by a step-in-aid taken more than 3 years after the last starting point. Once barred, the decree is ever barred. The criticism is also open to the comment made in *Koormayya* v. *Krishnamma Naidu*(5) that in deciding whether any particular act is or is not a step-in-aid of execution, it is the nature of the act that must be looked to and not the time at which it may possibly be done. Another argument is that the order made would not be a judicial order or order that can be refused. This argument is not available in the case of an order for possession which would be a decree and an appeal and a Second Appeal will lie from it. There is this difference between the old C. P. C. and the new that whereas under the old Code, S. 315, the purchaser has a right to get the money back, when he is deprived of the property by reason of want of title, there is no such right under the new Code. The view taken in the cases above referred to that there must be a pending execution application before you can talk of an application to take a step-in-aid would, if finally accepted, considerably offset the beneficial effect of the decision.

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4. (1900) I L R 27 C 709.
5. (1893) I L R 17 M 165 : 3 M L J 296.

RAMSARAN MANDAR *v.* MAHABIR SAHU, I L R 6 Pat. 323: 52 M L J 402 : 54 I A 55 (P. C.).

This judgment of the Privy Council is a technical one based on the form of the pleadings in the case. The suit was framed as an ordinary suit for specific performance of an agreement to sell, with an alternative claim for damages for breach thereof, such damages being assessed at the amount of the earnest money paid, with interest thereon. The junior members of the joint family were also added as parties to the suit but there was no allegation or proof that the agreement to sell the family land was for the necessity or benefit of the family. The father having died in the course of the proceedings, the sons and grandsons who were already parties to the suit were also recorded as legal representatives. Their Lordships held, in the circumstances that, the decree for return of the earnest money against the sons and grandsons cannot be sustained *in law*. Their Lordships point out that the suit is not one for "money had and received" or for recovery of a debt. The claim for return of the purchase money paid as earnest is not strictly speaking a claim for damages. Under S. 54, cl. 6 (*b*) of the Transfer of Property Act, the purchaser will even have a charge on the property as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest, for the amount of the purchase money properly paid by him in anticipation of the delivery of the property and for interest on such amount. It may be a different question whether the statutory charge is operative in the facts of the particular case, as the Bengal school of the Mitakshara Law does not permit a coparcener in a joint Hindu family to alienate even his undivided share. The judgment under notice is really based on the view that the nature and character of an action for return of purchase money with interest thereon is different from an ordinary action for damages for breach of an agreement to sell. Their Lordships point out that there was no amendment of the suit as originally framed even after the death of the original contracting party nor could such an amendment be ordinarily permitted as it would change the *nature* of the suit. It was not possible either, to support the decree against the sons and grandsons on the basis of the Hindu Law doctrine of pious obligation to pay the debts of the father which are neither illegal nor immoral. Even that basis of relief will be one altering the nature of the suit and besides the parties must have had an opportunity to rebut such new cause of action. It may also be noted that the

Privy Council dismissed the suit altogether, on the above view of the pleadings, notwithstanding the fact that the plaint also contained a general prayer for such other relief as the plaintiff may be entitled to on the facts found. The decision, however, is not an authority for holding that the plaintiff cannot claim in the same suit a relief for damages for breach of contract against the father and for return of purchase money against the father and sons on the basis of "money had and received" and on the liability of a Hindu son based on the doctrine of pious obligation. A comprehensive suit with the necessary allegations both against father and son can be framed so as not to offend against the rules relating to joinder of causes of action.

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MA THAUNG *v.* MA THAN, I. L. R. 5 Rang. 175 : 47 M L J 618 : 51 I A 1 (P C).

The rights of parties in the above case depended upon the question whether there was a partition between a father and his children. A document which was in form a deed of partnership between the father and his children was in reality held by their Lordships to be a record of a division of rights and interests. S. 92 of the Indian Evidence Act was held by the High Court not to stand in the way of oral evidence being permitted to show that it was really a partition arrangement which was put in the form of a deed of partnership, both because the evidence was let in by a third person not a party to the document in question and also because what was attempted to be proved *aliunde* was not a variation or contradiction of the terms of the document. The Privy Council also holds that while subsequent conduct of the parties to a contract reduced into writing is not admissible to vary or alter it, such conduct is admissible in evidence to explain or elucidate a contract open to different meanings. The distinction is real and noteworthy As observed by Sir Lawrence Jenkins in *Baijnath Singh* v. *Mahomed Hajee Abba* (1) S. 92 "does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances". On a review of the evidence and on the terms of the document, the Judicial Committee held that the document *evidenced* a partition between the parties thereto.

1. (1924) 48 M L J 339 (P C).

MUNICIPAL CORPORATION OF RANGOON *v.* THE SOORATEE BARA BAZAR CO., LTD., I L R 5 Rang. 212.

This is an instructive judgment as regards the validity of a bye-law made by a Municipal corporation under its statutory powers. It is now well settled that it is a general principle of construction that the sanction of Government does not render the bye-laws immune from the control of Courts as to their validity. Even if under the statute itself, the bye-laws when made are to have the same effect as if they were contained in the Act, there will be a difference between an enactment and a rule as regards the relative importance of the two in cases of conflict between them. There can, however, be no doubt of the Court's jurisdiction to declare the invalidity of a bye-law where the statute requires the bye-laws as in the generality of cases, not to be inconsistent with the provisions of the Act.

The general test as regards the validity of a bye-law is "its reasonableness." Bye-laws have frequently been declared to be *ultra vires* on the ground of unreasonableness if they are found to be partial and unequal in their incidence as between different classes, if they are manifestly unjust, if they disclose bad faith, if they involve such personal interference with the rights of those subject to them as no reasonable person could justify. It may also be noted that the Courts adopt a more benignant construction as regards the reasonableness of bye-laws made by Municipal and Local Government bodies or Government departments functioning merely for the control and well-being of the public than in the case of bye-laws made by corporations engaged primarily as traders as, for instance, Railway Companies. It has been stated that in the case of public bodies "credit ought to be given to those who have to administer the bye-laws that they will be reasonably administered" see *Slattery* v. *Naylor* (1) and *Kruse* v. *Johnson*(2). In the particular case, the Rangoon Council made a bye-law with the sanction of the Local Government imposing an oppressive and prohibitive fee for the issue of a license for the holding of a private market and it was rightly held that the rule levying a high licensing fee was in reality a rule imposing an unauthorised tax and *ultra vires* of the powers conferred on the Council.

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1. (1888) 13 A C 446.
2. (1898) 2 Q B 91.

SATYANARAYANA *v.* SEETHAYYA, I L R 50 Mad. 417 : 52 M L J 396.

The question as to how far suspension of limitation can be recognised apart from the sections of the Limitation Act has been the subject of many decisions and opinion has been fairly precipitating to the conclusion that it cannot. That is the opinion expressed by the majority of the Full Bench in *Muthu Korakkai Chetty* v. *Madar Ammal* (1) though on their view as to the facts of the particular case it was unnecessary to return an opinion on the question referred. The basis of the judgment in *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (2), according to that opinion, is to be found in S. 14 of the Limitation Act liberally interpreted. In partition actions, the defendant is in the same position as a plaintiff and the period during which he is actually pressing his claim and especially the time that intervenes between the passing of a decree in his favour and the cancellation of the same could legitimately be deducted under S. 14. The majority of the Judges are however for liberally interpreting wherever possible the starting point of limitation in the third column by dating the cause of action from a date when the litigation as regards the subject-matter is ended. Where it is not possible so to interpret the Article, the party is without relief. In this case, there was only a suit for a declaration that a pro-note has no consideration and was vitiated by fraud, etc. There was no means of interpreting the Article of limitation applicable, *viz.*, Art. 73, so as to give effect to the principle for the limitation starts under that Article from the date of the pro-note. There was the further circumstance that there was no impediment to the plaintiff suing on the pro-note during the pendency of the suit. The latest decision of the House of Lords holding that the fact that a person was declared a lunatic and was treated and confined as such would not suspend limitation against the public officer who was responsible for such confinement, etc. *Harnett* v. *Fisher* (3) shows that no such general equitable principle as was sought to be evolved by Mr. Justice Sadasiva Aiyar in the Full Bench Case in *Muthu Korakki Chetty* v. *Madar Ammal* (1) and certain other Judges is recognised.

1. (1919) I L R 43 M 185 : 38 M L J 1 (F B).
2. (1916) I L R 43 C 660 : 30 M L J 529 (P C).
3. (1927) A C 574.

BAI JIVI *v.* NARSINGH LALBHAI, I L R 51 Bom. 329.

This decision raises once more the question as to the defences open in a suit for restitution of conjugal rights between Hindus. The answer to the question depends largely on the basis of the claim in such a suit. The learned Judges seem to suggest that the origin of the action was one borrowed from the old ecclesiastical courts in England which administered the canon law between the husband and wife. That canon law as such has no binding force between Hindus can readily be conceded and what really applies between Hindus in the regulation of marital relations is the Hindu Law. Indeed, this was laid down most clearly in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v. *Shumsoonnissa Begum* (1) by the Privy Council half a century ago, where their Lordships held that in actions for restitution of conjugal rights between Mahomedans it is the Mahomedan Law that applies. After the decision in *Binda* v. *Kaunsilia* (2), where Mahmood, J., examined the question in all its fullness, it is no longer open to doubt that restitution of conjugal rights was not unknown to Hindu Law and that in such an action it is the rules of Hindu Law that are enforced. As often happens in enforcing the rules of Hindu Law, it is not easy to disentangle and distinguish rules of law from moral and spiritual injunctions. The right under the Hindu Law Texts of one spouse to the company of the other and of the exercise of the marital rights have been held to be legal and not merely moral or spiritual injunctions and the courts can therefore give effect to them in an action for the restitution of conjugal rights. In this connection we may submit that a suit for the restitution of conjugal rights cannot easily be assimilated to one for specific performance. Whatever justification there was in the Mahomedan Law under which marriage has many elements of a contract as observed in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v *Shumsoonnissa Begum* (1) there seems to be no basis for it in the case of a Hindu marriage which is a *samskara* or sacrament. Consequently what are enforced by the Court in a suit for restitution of conjugal rights are the rights and obligations flowing out of the relation of husband and wife under the Hindu Law Texts. The contract to marry having resulted in a marriage, it is not easy to see whether there is any scope for

1. (1867) 11 M I A 551. 2. (1890) I L R 13 A 126.

a suit for specific performance. Once the nature of the suit is clearly understood that it is one to enforce the obligations flowing out of the married status under Hindu Law, it is necessary to consider what under Hindu Law are the defences to a suit for restitution. Mr. Justice Mahmood has referred in the above case to the obligation of the husband not to forsake his virtuous wife and also to treat her with kindness and affection. It may be open to question whether the failure of the husband to observe these injunctions may not furnish a defence to an action for restitution of conjugal rights. There are, however, the texts which impose on the duty to look upon her husband as divine who is cruel to her and addicted to bad ways. The Hindu Law being thus not clear as to what defences are available, courts have applied the rules of the English law only as rules of justice, equity and good conscience. It therefore follows that the English rule as to "legal cruelty" being the only defence to a suit for the restitution of conjugal rights does not apply to Hindus, in all its rigour. In *Kondal Rayal Reddiar* v. *Ranganayaki Ammal* (3) the learned Judges held that the strict rule of English law on this question should not be applied among Hindus. The Privy Council pointed out in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* and *Jodonath Bose* v. *Shumsoonnissa Begum* (1) that other grounds of defence may be open among Mahomedans. Even in *Dular Koer* v. *Dwarka Nath Misser* (4) and *Babu Ram* v. *Musammat Kokla* (5) grounds other than cruelty have been recognised as defences among Hindus to a suit for restitution of conjugal rights. What those grounds are have not been enunciated anywhere with clearness and definiteness. It may, however, be said that under the decision under notice a husband will not be entitled to restitution of conjugal rights when he deserted his wife for no justifiable cause and the object of the suit was not *bona fide* to resume marital relations but only to defeat her claim for maintenance.

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UMED MAL *v.* CHAND MAL, I L R 54 C. 338: 52 M L J 368 (P C).

This being a decision of the highest tribunal will naturally be canvassed earnestly and it is therefore necessary to clearly

1. (1867) 11 M I A 551. 3. (1923) I L R 46 M 791 : 45 M L J 186.
4. (1905) I L R 34 C 971. 5. (1923) I L R 46 A 210.

understand the limits especially as S. 115 has been a fruitful source of conflict of decisions in this country. The properties which formed the subject-matter of the suit were claimed by the plaintiff to have been mortgaged to his predecessors-in-title by the owner and purchased by them in execution of a decree on the mortgage. The plaintiff alleged that the defendant had no title to the property and sought to recover the same from him. It is difficult to follow their Lordships when they say that for the purpose of deciding as between the plaintiff and the defendant whether the suit properties were comprised in the mortgage, the original mortgagor must be a party to the suit. Although any decision as between the plaintiff and the defendant whether the properties were included in the mortgage or not will not bind the mortgagor, it is not easy to see how the mortgagor is a necessary party to the suit between two different persons. Any expressions which fell from their Lordships on this question cannot be understood to have any general application, as their Lordships have clearly restricted themselves to the particular circumstances of the case, though it is by no means clear what the circumstances are.

On the other question, however, whether a decision of a suit in the absence of the necessary parties to it is a material irregularity in the exercise of jurisdiction within the terms of S. 115 of the Civil Procedure Code this pronouncement of their Lordships in the affirmative will set at rest all doubts on the matter.

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SHIBBI *v.* HARDHIAN SINGH, I L R 49 All. 370.

This is an obvious case. The plaintiff who had been party defendant in the suit on the mortgage had been exonerated from the suit on the ground that he set up a hostile title which could not be investigated in the mortgage suit. As against the others the mortgage suit was decreed and the property was sold. The decree-holder himself purchased the property and got symbolic delivery. The present plaintiff then put in a claim under O. 21, R. 100 but the Court rejected the claim on the ground that she had not been dispossessed at all. The present suit was, accordingly, brought for a declaration that she was entitled to the property on the footing that she was in possession or, in the alternative, for possession of the property on the footing that there was a subsequent dispossession, subsequent, that is after the order on the claim petition. In either view S. 47, C. P. Code, could not

be a bar to the suit. Neither of the reliefs was such as could be obtained in execution, and execution also had been completed and had in no way affected the plaintiff. Her present cause of action was one totally unconnected with the execution and based upon an event that happened after the completion of execution. It was as if a holder of a decree for possession obtained possession but was subsequently dispossessed by the defendant. In that case he could not further execute the decree, his only remedy being to sue on the new cause of action furnished by the subsequent dispossession.

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SALIK RAM *v.* WALI AHMED, I L R 49 All. 388.

Whatever the difference of opinion as regards precise effect of party offering to take an oath withdrawing without good reason, there is none whatsoever as to the conclusive effect of the oath taken in accordance with the agreement, even though the party agreeing to be bound resiles from the agreement. Equally the Courts are agreed that upon good cause shown the party agreeing to be bound may be permitted to withdraw from the agreement. It is somewhat difficult to formulate the grounds for which the party may be allowed to withdraw.

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THE SOUTH INDIA INDUSTRIALS *v.* NARASIMHA RAO, I L R 50 M 372 : 52 M L J 199.

The decision is an equitable one but it is difficult to reconcile it with S. 22, Limitation Act or O. I, R. 10, Civil Procedure Code, cl. (5). The general principle no doubt is that the Court adjudicates on the state of the affairs at the date of the plaint or application. It is on this principle that limitation is prescribed for applications and suits and not to orders. But S. 22 seems to go out of the way and date limitation as on the date when the defendant was made a party. This is in plain contravention of the general theory but the difficulty lies in reconciling the wording of S. 22 with the application of the general theory to this case also.

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MATHURA KURMI *v.* JAGDEO SINGH, I L R 49 All. 405.

Here the point that arose for decision was the ever-recurring point as to the legal effect of a sale-deed and an agreement to reconvey, whether it was a sale or a mortgage. The feather that turned the scale in this case was the fact that no outer time limit was fixed for paying the money and getting the reconveyance. In the language of the Privy Council in *Narasingerji* v. *Parthasaradhi Rayanam Garu* (1) "clearly, therefore, and within the intendment of the documents themselves, time is not of the essence in this matter; so soon as that is established all pretence for holding this ostensible sale and re-purchase to be anything else than a mortgage by conditional sale disappears". There can be a lawful agreement to sell without a time limit but it is the essence of the agreement to reconvey that after the time limit has expired, the party in default has not the right to demand a reconveyance and if this essential element is lacking, the inference that it is a mortgage almost inevitably arises upon the facts.

The angle of vision with regard to these documents has completely changed since *Narasingerji* v. *Parthasaradhi Rayanam Garu* (1). Their Lordships' disinclination to accept the course of decisions in this country based upon *Balkishen Das* v. *W. F. Legge* (2) as correct without more discussion is more or less regarded as amounting to a disapproval of them. This view receives considerable support from the reasoning of their Lordships in *Baijnath Singh* v. *Mahomed Hajee Abba* (3). Their Lordships say thus: "It is true as laid down in *Balkishen Das* v. *Legge* (2) that under S. 92 of the Indian Evidence Act as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this section, the section and the ruling have no application to it. The preamble to the Evidence Act recites that it is expedient to consolidate, define and amend the law of evidence and S. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." This is more or less getting rid of *Balkishen Das* v. *Legge* (2). Their

1. (1924) I L R 47 M 729 . 47 M L J 809 (P C).
2. (1899) L R 27 I A 58 · I L R 22 A 149 (P C).
3. (1924) 48 M L J 339 (P C).

Lordships' dicta cannot mean that the Court can come to the conclusion on the effect of the transaction on materials not permissible under the law to be used. Apparently what their Lordships mean is that a document which having regard to the course of business in this country, is an equivocal transaction, may be assigned its true legal character by reference to the surrounding circumstances.

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RAJAH BRAHASUNDAR DEB *v.* BHABAN SAHU, I L R 6 Pat. 373.

A person who was declared a disqualified proprietor and whose estate was taken charge of by the Court of Wards under Bengal Act (IX of 1879) was sued as a ward of the Court represented by the Manager of the Court of Wards as his guardian. The claim was on the basis of a personal liability arising out of a contract entered into by the ward. On an objection to the framing of the suit, on the ground that the ward must be sued personally and in his own name without the intervention of a guardian *ad litem*, it was decided that the suit was properly framed and was in strict conformity with the provisions of S. 51 of the Court of Wards Act. The fact that the suit was to enforce merely the personal liability of the ward did not affect the question. A similar question will not ordinarily arise in Madras for the reason that under S. 34 of the Madras Court of Wards Act (I of 1902), the ward is not competent to enter into any contract except one of marriage. In Bengal, however, a ward of Court is not disqualified from entering into a contract and although such contracts cannot be enforced against any property of the ward in the possession of the Manager under the Court of Wards, they can be enforced against the ward personally. [See *Dhanipal Das* v. *Maneshar Bakhsh Singh*(1) and *Collector of Benares* v. *Sheo Prasad* (2).]

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KUMAR GANGANAND SINGH *v.* MAHARAJAH SIR RAMESHWAR SINGH BAHADUR, I L R 6 Pat. 388.

There are several questions of importance raised and decided in the above case but we wish to draw attention in particular to the discussion relating to the liability of an infant on a contract where it was entered into on the fraudulent representation of the minor that he was of age. The strict common

1. (1906) I L R 28 A 570: 16 M L J 292 (P.C).
2. (1883) I.L R 5 A 487.

law doctrine was that the contract cannot be enforced against the minor even in such a case, although courts of equity in some cases compelled a restitution of goods obtained by the minor. It would be difficult to rely on these equitable principles after the examination of the question by the Court of Appeal in *Leslie Ltd.* v. *Sheill* (1) and by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2). Even if any equity can be urged in such a case, it must be established first that there was an express representation by the minor that he was of age. Mere inferences suggested by or drawn from the infant's conduct will be insufficient. In particular the mere execution of a vakalatnama and the filing of a written statement as in this case cannot be regarded as any such representation. As observed by Lush, L. J., in *Ex parte Jones* (3) "An infant cannot by any false pleading or by any mistake in pleading alter his status; his immunity remains notwithstanding". The above dictum which in that case was with reference to the immunity of the infant from being adjudicated a bankrupt is equally applicable to his immunity from liability on a contract.

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KING-EMPEROR *v.* NGA SAN HTWA, I L R 5 Rang. 276(F B).

The powers of the Subordinate Magistracy to grant bail to persons accused of non-bailable offence have been extended by the recent amendment to the provisions of S.497 of the Criminal Procedure Code. The Full Bench decision under notice rightly construes the expression "punishable with death or transportation for life" in clause (1) of the section disjunctively as if it ran "punishable with death or punishable with transportation for life". We agree that the decision to the contrary in *Mahomed Eusoof* v. *King-Emperor* (4) and in *Tularam* v. *Emperor* (5) holding that "death or transportation for life" is a single inseparable phrase, is not correct. As regards the further observations by the Full Bench, as to the lines on which Magistrates should exercise their discretion which has been conferred on them by the amended section with reference to the granting of bail for persons accused of non-bailable offences other than those punishable with death or with transportation for life, we do not see why the High Court should attempt to tie the judicial discretion of the magistracy. Nor is it clear

1. (1914) 3 K B 607. 2. (1916) 2 A C 575.
3. (1880) L R 18 Ch. D 109. 4. (1925) I L R 3 Rang. 538.
5. (1926) 97 I C 39.

that the observations of the Full Bench exhaust all the relevant circumstances which the Courts should ordinarily take into consideration in deciding the grant or refusal of bail to accused persons. There seems to be no reason for differentiating between the principles which guide the High Court of session in the exercise of their absolute discretion under S. 498 of the Criminal Procedure Code, and the principles which ought to guide the magistracy in the exercise of *their* discretion under S. 497, cl. (1). It is well established that the important considerations that should be borne in mind are "whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial and whether there is any reason to suppose that he is likely to tamper with the witnesses who would be called against him". As has been observed by the Madras High Court in *The Public Prosecutor* v. *Sanyasayya Naidu* (1) "the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the guilt or innocence of the accused. The Court would be entirely exceeding its function if it did that in any detail".

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1. (1924) 22 L W 156.

KASISWAR RAY *v.* SATYA BHAMA DAS, I L R 54 Cal 374.

This case raises an interesting question as to the forum competent to entertain a review of a judgment. A petition for setting aside an execution sale was dismissed for default by the second Subordinate Judge's Court in a place. At the time when a review of the judgment was asked for, the officer who dismissed the petition for default was placed by the District Judge in charge of the first Subordinate Judge's Court in the same place and the question was whether the same officer when presiding over the first Subordinate Judge's Court can entertain the review application under O. 47, R. 2 of the Civil Procedure Code; and the learned Judges have answered the question in the affirmative. The decision is not of such far-reaching importance as it may appear at first sight, as it depends to a large extent upon the terms of S.13, sub-sections (1) and (2) of the Bengal Civil Courts Act. The enactment provides that every Subordinate Judge has, subject to the notification by the Local Government, jurisdiction over the whole District and the District Judge is given power under sub-section (2) of S. 13 to settle the class of business which each Subordinate Judge is to dispose of and it has been held in *Bachu Koer* v. *Golab Chand* (1) that the District Judge has no power to restrict the local jurisdiction of Subordinate Judges and that it is only the Local Government that has the power to do so. The decision would not have been the same if the question arises, for instance, under the Madras Civil Courts Act, as S. 10 specifically empowers the District Judge to interfere with the local jurisdiction of the Subordinate Judges in the District. Though the decision has thus only a limited application, we venture to submit that the conclusion of the learned Judge is not the only one that can be come to on the question. We are not sure whether in coming to the conclusion the learned Judges kept in view both O. 47, Rr. 1 and 2 of the Code. In the case of a review, R. 1 provides that the application must be made to the Court which passed the original order. R. 2 imposes a further restriction that, in certain cases, it should be not merely to the same court that passed the former order but to the same officer presiding in that court. The necessity for both the essentials to co-

1. (1899) I L R 27 Cal. 272

exist was clearly pointed out in *Ram Baran Chaube* v. *Bhagwati Pandey* (1). If, for instance, in the case under notice, a review was applied for, on the ground of discovery of fresh material evidence, a case falling under the exception to O. 47, R. 2, can the application be made to the second Subordinate Judge's Court who gave the original decision irrespective of the personnel of the Judge. We venture to think the answer must be in the affirmative. The decision of the learned Judges would point to the conclusion that the review petition might in such a case be presented to the first Subordinate Judge. Then, can it be that both the Courts can deal with the review application? Or, may it even be that all the Subordinate Judges in the District have jurisdiction to deal with the review application? These are some of the considerations that arise in the decision under notice.

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RAM GOPAL GHOSE *v.* DHIRENDRA NATH SEN, I L R 54 Cal. 380.

In this case, a learned Judge of the Calcutta High Court has differed from the long series of cases commencing from *Krishna Aiyar* v. *Krishnasami Aiyar* (2) and ending with *Raghunath Singh* v. *Sri Narain* (3) to the effect that when a promissory note is executed by the manager of a joint family and the loan is contracted for purposes binding on the family, a decree can be obtained against the other members of the family in a suit based on the note. It may be noticed in this connection that doubts have been entertained of the correctness of the decision in *Krishna Aiyar* v. *Krishnasami Aiyar* (2) by Messrs. Bhashyam and Adiga in their well-known commentaries on the Negotiable Instruments Act. *See* pp. 516, 517, 3rd edition. The question is one of constant occurrence and a conflict of decisions on it will therefore cause considerable embarrassment to the subordinate courts. Of all the decisions referred to by the learned Judge in support of his view, except the decision in *Vithalrao* v. *Vithalrao* (4), no other case dealt with the exact question of a manager of a joint family. The case in *Sadusuk Janki Deo* v. *Maharaja Sir Kishan Pershad* (5) on which very strong reliance has been placed by the learned

1. (1925) 23 A L J 674. 2. (1900) I L R 23 M 597.
3. (1923) I L R 45 A 434. 4. (1922) 25 Bom. L R 151.
5. (1918) L R 46 I A 33 : 36 M L J 429 (P C).

Judge was a case of strict agency falling under Ss. 27 and 28 of the Negotiable Instruments Act. Indeed, its effect was restricted to cases of agency in *Krishnanand Nath Khare* v. *Raja Ram Singh* (1). The manager of a joint family is clearly not an agent of the family. Ss. 27 and 28 must therefore be conceded to have no direct application to the cases of joint families. Again the observations of James, L. J., in *In re Adansonia Fibre Co.* (2), cannot be directly applied to the case of a Hindu joint family as Indian law knows more of joint families, their character and incidents than of corporations or partnerships and it cannot be dismissed as not coming within any well-known category of association of persons known to law. In saying this, we do not fail to perceive the full force of the observations of the learned Judge in the case under notice about the want of clearness in the reasoning of the majority of the Judges in *Krishna Aiyar* v. *Krishnasami Aiyar* (3). It must be admitted that in the above case the majority have to some extent confused the liability for the debt and that under the pronote. It must be observed at the same time that the question whether in any case the debt is merged in the pronote or not is somewhat metaphysical and has led to conflicting decisions. See *Muthu Sastrigal* v. *Viswanatha Pandarasannadhi* (4) and *Shanmughanatha Chettiar* v. *Srinivasa Aiyar* (5), though we venture to think that the view in the latter case is preferable and accords more with justice and the decision in *Sadusuk Janki Deo* v. *Maharaja Sir Kishan Pershad* (6). Under these conditions we are not sure whether the rule of *stare decisis* may not have been applied especially because the legislature has not stepped in, notwithstanding that there have been occasional amendments of the Act, in recent years. In the case under review, apparently, the manager did not purport to execute the note as such. It may, therefore, be still a question whether if the manager purports to execute the note in that capacity, the other members can be made liable on the note, if it was executed for a binding purpose. Here it may be observed that the learned Judge in more than one place refers to the application of the amount for purposes binding on the family as necessary for binding the other members. We venture to think that this is merely a slip as it has long been established that it is the purpose

1 (1922) I L R 44 A 393. 2. (1874) 9 Ch. A 635.
3. (1900) I L R 23 M 597. 4. (1913) I L R 38 M 660 26 M L J 19.
5. (1916) I L R 40 M 727 · 31 M L J 138.
6. (1918) L R 46 I A 33 : 36 M L J 429 (P C).

for which the loan is incurred that makes the loan binding on the other members and not the application of the money borrowed. See *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1) and *Krishn Das* v. *Nathu Ram* (2). On the view taken by the learned Judge we do not believe that even promissory notes executed by managers of trading families would stand on any different footing. It may be finally submitted that the framing of the suit on the original cause of action as well will not in all cases remove the hardship involved in the view taken by the learned Judge. For instance, in cases where there have been acknowledgments of the liability under the note, it may be difficult to contend that a suit on the original consideration would be saved from the bar of limitation. Again where the note has been negotiated to strangers, the indorsee may not be able to maintain an action on the original cause of action against the other members of the family. Cf. *Shanmughanatha Chettiar* v. *Srinivasa Aiyar* (3). In *Nataraja Naicken* v. *Ayyaswami Pillai* (4) it has even been held that a suit on the note itself can be maintained by the indorsee against the other members of the family.

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EAST INDIAN RAILWAY COMPANY v. BADRI NARAIN, I L R 6 Pat. 445.

This is a clear case and supported by ancient authority. The Privy Council laid down long ago in *Durga Das* v. *Ramanadha Chowdhry* (5) that costs of a suit are in no sense the subject-matter of the suit and the amount of costs cannot be taken into account in arriving at the appealable value of Rs. 10,000 for purposes of an appeal to the Privy Council. The decision in the case is to the same effect though no reference is made to the Privy Council decisions. It is quite a different matter that a party appealing specifically against an order for costs irrespective of or in addition to other portions of the decree on the merits is bound to pay Court-fee on the amount of costs appealed against. For the purposes of S. 110 of the Civil Procedure Code it is settled by authority that costs are not the subject-matter of the suit.

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1 (1856) 6 M I A 393 2. (1926) L R 54 I A 79 : 52 M L J 720 (P C)
3 (1916) I L R 40 M 727 . 31 M L J 138 4. (1917) 32 M L J 354
5. (1860) 8 M I A 262.

JESA RAM *v.* THE COMMISSIONER OF INCOME-TAX, I L R 8 Lah. 347.

GANESH DAS *v.* THE COMMISSIONER OF INCOME-TAX, I L R 8 Lah. 354.

The extent and scope of the power of the Income-tax Commissioner under S. 33 of the Income-tax Act (XI of 1922) to call for the record of any proceeding under the Act and to pass such orders thereon as he may think fit, came up for discussion in the above cases. The judgments negative the contention of the Commissioner that there is no time-limit for the exercise of his powers under S. 33 and hold that the restriction as to limitation under S. 34 and S. 35 of the Act are applicable to the Commissioner acting under S. 33 as well. Reliance is placed by their Lordships on the use of the words "subject to the provisions of this Act" in S. 33, as indicating the intention of the Legislature. It may be noted that these particular words are an addition in the new Act and that no such words are found in the corresponding section of the old Act (VII of 1918). The whole question is discussed much more fully in the judgment of the Madras High Court in *Commissioner of Income-tax* v. *Sheik Abdul Kadir Marakkayar & Co.* (1). As pointed out in the said decision the so-called power of review under S. 33 is really a revisional power by way of superintendence. It follows that the Commissioner has no power to initiate proceedings under S. 34 or S. 35 either to assess or re-assess income which has escaped assessment or to rectify any mistake. These specific powers can be exercised only by the Income-tax Officer, and that in the manner indicated and within the period of limitation provided for by S. 34 and S. 35. The proper service of the notice prescribed by the section is a condition precedent to the exercise of such jurisdiction. The Commissioner will therefore be incompetent to impose any additional tax after the expiry of the statutory period and S. 33 does not empower him to do so. The exercise by the Commissioner of this power of revision under S. 33 of any proceedings properly initiated by the Income-tax Officer under Ss. 34 and 35 however does not come under any statutory period of limitation and the matter is left at large. On general principles such powers of revision ought to be exercised within a reasonable time.

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1. (1927) M W N 611.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* NISTARINI ANNIE MITTER, I. L. R. 6 Pat. 446.

The question in this case was whether a lease deed by the Government can be described as a "document purporting to be or to evidence grants or assignments by Government of land or any interest in land" within the meaning of S. 90 (1) (*d*) of the Registration Act, 1908 and as such exempt from registration. It has been answered in the negative by the Allahabad High Court in ***Munshi Lal* v. *The Notified Area of Baraut*** (1) and in the affirmative by the Madras High Court in ***Kallingal Moosa Kutti* v. *The Secretary of State for India*** (2). The decision under notice agrees with the Madras view and we think rightly. Though at first sight it may appear to be a clumsy way of describing an ordinary lease-deed as a document evidencing a grant of an interest in land, the language of S. 90 cannot be said to be inapplicable. The reference to "sanads and inam title-deeds" in S. 90 also indicates that grants of any interest in land by the Government even though subject to conditions are subject to the exemption from registration. There is no reason for limiting the exemption to such documents only as pass the whole interest of the grantor without reservation. Sanads granted by Government are frequently subject to conditions, as, for instance, sanads in respect of service tenures. Nor is there anything in the language of S. 90 to indicate that a restricted interpretation should be placed on it so as to exclude ordinary lease-deeds. The provisions of the Act relating to exemption from registration of certain classes of documents when they are executed by the Government are partly found in S. 17 and partly in S. 90. This piece of inartistic drafting should not, however, be understood as justifying an inference that the class of documents mentioned in S. 17, cls. (*a*) and (*b*) is not intended to be included in the general description of the language used in S. 90.

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1. (1914) I L R 36 A 176.
2. (1920) I L R 43 M 65 : 37 M L J 332.

RAM CHARAN SAHU *v.* MATA PRASAD, I L R 49 All. 565.

In a suit for possession and mesne profits past and future the Court failed to include future mesne profits in the decree. The question was whether a subsequent suit for mesne profits for that period is barred. Their Lordships merely indicate the difference of opinion that exists on that point but decide the question on a point of limitation, *viz.*, that the suit for mesne profits should be instituted within three years under Art. 109 of the receipt of the profits. The way in which the article was sought to be got over was (1) that the limitation was suspended during the pendency of the previous litigation, (2) that it was only by the Appellate Court's decision that the plaintiff was held entitled to unconditional possession and therefore limitation should be held to start only from the date of declaration of plaintiff's unconditional right to possession. Both these arguments their Lordships repel and hold that the claim was barred.

The view in favour of suspension of limitation for reasons other than those provided in the Limitation Act is being discredited—almost all the High Courts in recent cases have pronounced in a contrary sense on the question [*Satyanarayana Brahmam* v. *Seethayya* (1), *Snt. Sarat Kamini Dasi* v. *Nagendra Nath Pal* (2) and the Allahabad High Court in this case]. The only case in the way *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (3) is explained as a case of S. 14, Limitation Act, interpreted liberally. Pendency of litigation in respect of the subject-matter is a legitimate factor to be taken into consideration in determining the starting point of limitation under the 3rd column when the language admits of such a benevolent interpretation. *Bassu Kuar* v. *Dhum Singh* (4) was a case of such benevolent interpretation applied to Art. 97, *Baijnath Sahai* v. *Ramgut Singh* (5) to Art. 12, *Muthu Korakkai Chetty* v. *Madar Ammal* (6) to Art. 180, and *Rangayya Appa Rao* v. *Bobba Sriramulu* (7) to Art. 110. Art. 109 does not admit of such a manipulation and the declaration of the Court as to plaintiff's right to unconditional possession could not give a fresh starting point, for Courts ordinarily only declare rights and do not

1. (1926) I L R 50 M 417.
2. (1925) 29 C W N 973.
3. (1916) I L R 43 C 660 (P C).
4. (1888) I L R 11 A 47 (P C).
5. (1896) I L R 23 C 775 (P C).
6. (1919) I L R 43 M 185 (F B).
7. (1903) I L R 27 M 143 (P C).

create rights. Where they may be said to be creating rights as in the case of setting aside voidable transactions, it is quite true that after the decree there might be rights arising but so far as claim to mesne profits for the antecedent period is concerned, that is a matter which they should provide for in settling the equities and if they do not provide for them, there would be no further right to litigate about the same matter.

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GOSWAMI GORDHAN *v.* BISHAMBAR, I L R 49 All. 597.

The fallacy in the reasoning in this case is that a claim for future mesne profits is taken to be a relief in respect of the same cause of action as possession. That the cause of action is not the same has been held in numerous cases and that affords the justification for the string of cases which hold that a suit for possession does not bar the suit for even past mesne profits. The cause of action for future mesne profits did not even accrue at the date of the plaint for the suit for possession. Suits for redemption stand on an entirely different footing; there the cause of action is the mortgage and all claims in respect of the mortgage by way of accounts or otherwise should be settled by the decree and cannot be agitated after the decree.

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AMAR SINGH *v.* GOBIND RAM, I L R 49 All. 606.

Estoppel against estoppel setteth the matter at large is a familiar principle but cannot obviously apply to *res judicata*. There the last decision must operate as *res judicata* because the previous decision if it did operate as such might and ought to have been pleaded in the previous suit and if it was not, the last decision must be constructively taken to have overruled the plea.

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MAHARAJA OF DUMRAON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 6 Pat. 481 : 53 M. L. J. 576 (P C).

This decision re-establishes the authority of the early decision of the Privy Council in *Lopez* v, *Muddun Mohun Thakoor* (1) which was supposed to be somewhat shaken by later decisions of their Lordships. Their Lordships not only reiterate the soundness of the principle laid down in the earlier case viz., that the law of acquisition by alluvion does not operate as confiscation of any private person's property and is applicable only to the gain which an individual proprietor may make from that which was part of the public property, the 'public domain' not usable in the ordinary sense but they apply the principle equally well where the diluviated land is re-formed *in situ* not merely on the same side of the river as in *Lopez's case* (1) but on the opposite side of the river as in the decision under notice. "It is a principle founded in universal law and justice that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano or a field covered by the sea or by a river, the ground, the site. the property remains in the original owner." It follows that an owner of property, whose land is diluviated and re-formed *in situ* is entitled to it, even if the re-formation is by gradual, slow and inperceptible means, as a result of fluvial action. The governing facts will be whether there has been an abandonment of the proprietary right in the diluviated site by the original owner and the identity of the newly formed land. The latter question is merely a matter of latitude and the longitude. There is nothing in principle to confine the law of accretion to longitudinal annexations only and to deny its operation in the case of vertical annexations. It is of course a different matter where after diluvion and before re-formation, the title of the original owner is either abandoned or lost by adverse possession. In such a case there being no competition with rights of private property the general law of accretion will apply unhampered.

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MA PAING *v.* MAUNG SHWE HPAW, I. L. R. 5 Rang. 296 (F. B.).

To the student of comparative jurisprudence this decision of the Full Bench forms interesting reading. The Burmese

1. (1870) 13 M I A 467.

Buddhist Law on the rights of husband and wife during coverture is so special and peculiar that no useful analogy can be found in the laws of other systems of jurisprudence. It is interesting to note how the ancient and archaic rules are made to subserve the practical conditions of modern day commerce by reference to and adoption of substantive provisions of Partnership Law and processual rules about representative actions. The decision holds in effect, that husband and wife are partners and all the property of the marriage is partnership property. No doubt the shares of the husband and wife on dissolution of the partnership either by death or divorce are different and vary with the time and manner of the acquisitions. During coverture, however, neither party is entitled to separate possession nor can there be any alienation, voluntary or by execution process of the undivided share of either spouse. The rights of creditors are however safeguarded by applying the well-established rules of the Contract Act with reference to Partnership Law. One is easily reconciled to judicial legislation by decisions of this nature.

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M. A. MAISTRY *v.* ABDUL AZIZ RAHMAN, I L R 5 Rang. 471.

The division Bench has in this case reversed the decision of the Trial Judge which is reported in *M. A. Maistry* v. *Abdul Azis Rahman* (1). In commenting on the decision on the previous occasion we pointed out that the decision was opposed to the principle of the ruling of the Privy Council in *Radha Raman Shaha* v. *Pran Nath Roy* (2). (See 52 M L J, Notes of Indian cases, p. 35). We are glad to note that our criticism has met with the approval of the Appellate Court and that the judgment of the Trial Judge has been revised on appeal.

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1. (1926) I L R 5 Rang. 46. 2. (1901) I L R 28 C 475 (P C).

SARAT CHANDRA BOSE *v.* BISWESWAR MITRA, I L R 54 Cal. 405.

The conflict of judicial opinion is thickening on the questions whether in any given case, the Court can set aside a decision passed on default under the provisions of O. IX of the Civil Procedure Code and whether or not resort can be had to the inherent powers of court when a case does not fall under O. IX. The references to the decisions noticed by the learned Judges in this case show that the conflict ought not to be allowed to grow so as to embarrass the lower courts, if already they are not embarrassed. The power to remedy this state of things is in the High Courts themselves without any resort to the legislature. The Courts are apparently not satisfied with the limits imposed by O. IX on their power to set aside judgments for default and they therefore invoke the aid of S. 151 for which there are some difficulties as pointed out in *Neelaveni* v. *Narayana Reddi* (1). If so the High Courts can avail themselves of their rule-making power and add suitable provisions in O. IX or elsewhere in the Code to meet really hard cases where there is no lack of diligence on the part of litigants with suitable safeguards as to costs or otherwise for the rights of the opposite party.

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RAGHUNANDAN NANU *v.* HORMASJEE BEZONJEE, I L R 51 Bom. 342.

The question in this case is one of some interest and it is difficult to decide between the conflicting views of Shah, J., in the trial Court on the one hand and of the appellate court on the other. Two persons entered into an agreement purporting to be one of partnership under which one of them was to receive a fixed sum of money "in lieu of his share of profits" and was not to be liable for losses and the other was to continue to be the owner of the stock-in-trade even during the subsistence of the so-called partnership. They were spoken of throughout in the document as partners. The question was whether this agreement constituted them a partnership. Mr. Justice Shah held that it only created an agency and not a partnership and the appellate court took the contrary view. The learned Judges of the appellate court seem to have proceeded on the view that an actual sharing of the profits is not of the essence of a partnership. We find some difficulty in reconciling this view with the

1. (1919) I L R 43 M 94 : 37 M L J 599.

language of S. 239 which is the sole guide in this matter, the English or Indian decisions prior to the Act and the previous state of the law being no guides in the construction of the section as pointed out in *Raghumull Khandelwal* v. *The Official Assignee of Calcutta* (1) by a bench of three Judges. If in a year when the so-called partnership made only a loss and still one of them was entitled to his amount as admittedly he was in this case, how can it be said that there is a sharing of profits. The fixed amount seems only to partake of the character of a salary payable to him, by whatever name parties may choose to call it. We are not sure that the expression "salaried partner" used in common parlance and referred to by the learned Judges is not a legal misnomer. In all the English cases and Indian cases prior to the Act, though any reference to them is not strictly necessary, there have been controversies whether the right to a share of profits by itself or as such, made the recipient a partner. See *Mollwo, March & Co.* v. *The Court of Wards* (2). But we doubt whether a sharing of the profits with an incidental right to account was ever considered unessential to the constitution of a partnership. In a recent case in the Lahore High Court, the sharing of profits was considered of the essence of a partnership. See *Abid-ud-din* v. *Bisharat Ali* (3). It is therefore permissible to doubt whether the conclusion of Shah, J., was not the correct one in the case.

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NILKANTH BALWANT *v.* VIDYA NARSINHA BHARATI, I L R 51 Bom. 430 (F. B.).

This decision of the Full Bench shows that the legislature has failed in its professed object of expediting the disposal of appeals to the Privy Council and curtailing the discretion of the High Court in extending the time for the appellant furnishing security for the costs of the respondent or making the deposit requisite for the purpose. As observed by the learned Chief Justice in the case under notice, if rule 9 of the Privy Council Rules imposes no limit of time to the discretion of the High Court in ordering security for the costs of the respondent in a Privy Council appeal and that seems to be the opinion of the Madras High Court in 48 M L J 19 (Notes of Recent Cases), it is immaterial whatever amendment is made in the terms of O. XLV, R. 7 of the Civil Procedure Code, because, as pointed out by his Lordship, nothing

1. (1923) 28 C W N 34. 2. (1872) L R I A Supp. Vol., 86.
3. (1927) I L R 8 Lah 310.

in the Civil Procedure Code can affect the operation of the rules framed by the Privy Council. It may perhaps be doubted whether S. 112 of the Code has not reference solely to cases coming before the Privy Council by the special leave of the Privy Council; but it must be admitted that the section is not clearly so restricted in its scope. If section 112 is therefore general in its character, there is no escaping the conclusion arrived at by the Full Bench in the case under notice that there is still an unfettered discretion. *Ram Dhan* v. *Prag Narain* (1) is really not against the view of the Full Bench as the decision was given only under O. XLV, R. 7 of the Code, and R. 9 of the Privy Council Rules was not considered. *J. N. Surty (Receiver)* v. *T. S. Chettyar Firm* (2) simply follows *Ram Dhan* v. *Prag Narain* (1) and it is somewhat strange that there is no discussion of the effect of R. 9, although apparently the attention of the learned Judges was drawn to *Nagireddi* v. *Saki Reddi* (3) where that rule is referred to. This rule was considered in *Nagireddi* v. *Saki Reddi* (3) but not very fully, and it is difficult to reconcile the meaning given to it in that case with that given in 48 M L J 19 (Notes of Recent cases), though in the latter case, the prior decision was distinguished as applying to cases falling only under the Civil Procedure Code. In the latter case, the learned Judges had not to consider the effect of S. 112 of the Civil Procedure Code. The conflict between the rules in the Civil Procedure Code and the Privy Council Rules would have been avoided if the construction of R. 9 by Fawcett, J., had been adopted by the Full Bench. But that view has not been taken even in the later Madras case referred to above. The result is not satisfactory in carrying out the avowed object of the legislature and the law remains much the same notwithstanding the amendment of O. XLV, R. 7 of the Civil Procedure Code.

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DURGI *v.* KANHAIYA LAL, I. L. R. 49 All. 579.

So far as the validity of the disposition in favour of the widow is concerned, the judgment of the Privy Council in *Krishnamurthy Ayyar* v. *Krishnamurthy Ayyar* (4) must be taken to conclude the question and the sole question that remained we think is—what exactly is the nature of the estate created in favour of the widow. A widow's estate would undoubtedly

1. (1921) I L R 44 A 216. 2. (1926) I L R 4 R 265.
3. (1922) 18 L W 29. 4. (1927) I L R 50 M 508 : 53 M L J 57 (P C).

be divested by the adoption while there is absolutely no reason to hold that an absolute gift in her favour should be divested by the adoption. A will by the adopter in respect of his self-acquisition is not revoked by the adoption any more than by the birth of an *aurasa* son. Neither would a life-estate in favour of the widow be affected by the adoption but a bequest in favour of the widow coupled with a power to adopt may generally be construed as a grant of a widow's estate which will be divested by the adoption. In this case, the testator had given an absolute estate to the widow and had also clearly expressed that during her lifetime, the adopted son should have no power over the estate.

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CHANDRASHEKHAR *v.* AMIR BEGUM, I. L. R. 49 All. 592.

In the absence of a rule like that enacted in O. 9, R. 8 in respect of suits, there is nothing to preclude a person from making any number of applications in respect of the same subject-matter so long as there is no disposal of the question on the merits. The application to make a final decree being an application in a suit, S. 141 would not apply to it and consequently there could be no justification for the argument that O. 9, R. 8, could apply to the case. The article of limitation applicable to such an application is Art. 181 and there is no provision in respect of that article like that in Art. 182, cl. (5), to give the applicant the benefit of previous applications to save limitation. Provided, so that, the applicant is within 3 years of the accruing of the right to apply, he may make any number of applications. Their Lordships of the Privy Council having ruled in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1) that after a preliminary decree the suit itself cannot be dismissed for default, the party is safe for 3 years after the accrual of the right to apply and this is not to be regretted as the obstructions and pitfalls placed in the way of an honest claimant by the Indian Procedure are many and having regard to the fact that the chances of recovery of the fruits of litigation are rendered so often doubtful by the combined operation of processual difficulties and the chicanery of the judgment-debtors.

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1. (1924) L R 51 I A 321 : 47 M L J 441 (P C).

VERTANNES AND OTHERS *v.* ROBINSON AND ANOTHER, I L R 5 Rang. 427 : 53 M L J 71 (P C).

Even under English Law the expression *"effects"* in a will may in certain contexts include real estate though primarily the word refers to personal estate or moveables . In India where there is little distinction between moveable and immoveable property the expression is certainly of sufficient amplitude to include immoveable property. Still, the Privy Council reversed the decision of the High Court in this case as the context showed that there was no intention on the part of the testator to bequeath any other immoveable properties besides the houses expressly devised already and the collocation of words used along with the expression *'effects'* also pointed to the same conclusion. It followed therefore that there was an intestacy with reference to the lands in dispute which therefore devolved upon the heirs under the law of intestate succession. The conveyance by the executrix in favour of a purchaser was therefore inoperative to pass the title to the shares of the heirs other than that of the executrix herself who was entitled to one third of the properties as one of the heirs of the testator. Nor could the sale be upheld as an act required for the administration of the estate as it was found that long prior to the sale in question, the estate had been completely and properly administered. The decision in *Bijraj Nopani* v. *Pura Sundary Dasee* (1) had obviously no application to the present case, as the sale here was not in the course of administration and for that purpose. The sale in the present case could not have been valid even if the vendor purported to convey the property expressly in her capacity as executrix. In the circumstances of the case, her character as executrix had ceased and she was holding the shares belonging to the other heirs only as trustee for them.

Their Lordships also hold that there was no estoppel under S. 115 of the Indian Evidence Act, as the purchaser did not act on any representation of the other heirs of the testator. Their Lordships find as a fact that both the purchaser and the beneficiaries were equally ignorant of the real rights of the parties and were under a common error. It may be noted that as regards one of the heirs the Privy Council hold that he is estopped under S. 116 by reason of his having attorned as a tenant to the purchaser. The judgment of their Lordships which allows a decree of ejectment against him and a declaration that the plaintiff-purchaser was entitled to the share of that particular defendant should not however be understood as

1. (1914) I L R 42 C 56 : 27 M L J 93 (P C).

finally deciding that he cannot recover his share in a properly constituted suit after first surrendering possession of the property. The refefrence to their Lordships' judgment in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2) only shows that no question of title can be investigated in this suit before possession is surrendered. In the absence of a finding of an estoppel under S. 115, sueh title, if any, can be established in a separate action as plaintiff.

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SONIRAM JEETMULL *v.* R. D. TATA & CO., LTD., I L R 5 Rang. 451: 53 M L J 25. (P C ).

It is a well established rule of English common Law that a debtor should seek out the creditor and pay him at the place where the creditor resides. This duty however is, as observed by the Privy Council in the case of *Bansilal Abirchand v. Ghulam Mahbul Khan* (3), only imposed upon him when the creditor is within the realm. The question has been raised in some cases whether the rule is applicable under the Indian Law, because of S. 49 of the Indian Contract Act. The Privy Council hold in the decision under review that S. 49 of the Indian Contract Act as to the place of performance does not get rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The place of performance need not necessarily be expressed in terms in the contract itself, but the same may appear sufficiently by clear implication. Notwithstanding the doubts expressed in *Raman Chettiar* v. *Gopalachari* (4), such an implication as to the place of performance may be made not merely from the terms of the contract but also from the necessities of the case and the Court is entitled to consider the circumstances in which the contract was made. Once the Court comes to a conclusion as to a place of performance fixed by the contract either expressly or by implication, S. 49 of the Contratc Act has no application. The jurisdiction of a particular civil court to entertain suits for the recovery of a loan or payment of money due under a contract depends upon whether a part of the cause of action arises within the local limits of the jurisdiction of the court, S. 20, cl. (*c*) of the Code of Civil Procedure, and the courts of the place where the payment of money is to be made will therefore have jurisdiction. It does not however follow that the mere fact of re-

2. (1915) I L R 37 A 557 : 29 M L J 335 (P C).
3. (1925) I L R 53 C 89 · 49 M L J 806 (P C).
4. (1908) I L R 31 M 223.

sidence of a promisee a particular place would be a sufficient circumstance in itself in all cases to raise an implication of an intention to fix that place as the place of performance of a contract. Their Lordships point out that in the particular case there were other circumstances which indisputably pointed out the place of performance. The nature of the business, the origin of the debts, the course of dealing and the necessities of the case are all relied upon by their Lordships as indicating the intention of the parties as to the place of performance of the obligation undertaken. The change of language in S. 20 of the Civil Procedure Code should also be noted in this connection, the legislature having omitted the definition which was contained in the old Procedure Code.

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MUSSAMUT GULJANIA *v.* KING EMPEROR, I L R 6 Pat. 583.

S. 239 cl. (*f*) of the Code of Criminal Procedure provides for a joint trial of persons accused of offences under Ss. 411 and 414 of the Indian Penal Code or either of these sections in respect of stolen property "the possession of which has been transferred by one offence" This decision holds that the transfer referred to in the qualifying clause can only be the change of possession from the owner to the thief and not the transfer of possession of the stolen articles from the thief to the receivers. Where, therefore, several articles, stolen in the course of a single theft, are transferred to different persons by different transactions, there can now be a joint trial of the several receivers of the stolen property for offences under S. 411 of the Indian Penal Code. Prior to the amendment of S. 239 by the Criminal Procedure Code Amendment Act of 1923, such a joint trial was held illegal by the High Courts as the respective offences could not be regarded as offences committed in the same transaction within the meaning of the old S. 239. The amendment has now provided for a joint trial in such cases. The use of the word 'transfer' to denote the removal of possession of the stolen articles by the thief can hardly be regarded as accurate or appropriate. Notwithstanding the somewhat obscure language of the section it is clearly the intention of the legislature to take in the class of cases where the original removal of the articles was by a single offence of theft, although the subsequent disposal of the stolen articles was by different transactions to different persons. The contention that the transfer of possession referred to is the transfer by the thief to the receivers cannot be accepted as such a construction of the language used will render S. 239 clause (*f*) itself a superfluity.

ISHWARI PRASAD *v.* RAI HARI PRASAD LAL, I L R 6 Pat. 506.

This is an interesting judgment which deals exhaustsively with the question whether the Kayasthas of Bihar are Kshatriyas or Sudras. The Calcutta High Court has been holding that the Kayasthas of Bengal at any rate are now Sudras though originally they seem to have been recognised as Kshatriyas, *Asita Mohan Ghosh* v. *Nirod Mohan Gosh* (1). Reliance was largely placed on the authority of the Vyavastha Darpana of Shyama Churn Sircar. The exact question was however left open by the Privy Council when the abovementioned case went up to them, *Asita Mohan Ghosh* v. *Nirode Mohan Ghosh* (2). Notwithstanding this, the Calcutta High Court has even in its later judgments adhered to the same view. This view has been condemned by Indian scholars of repute, vide Sircar Sastri's Hindu Law, page 123, Sarvadhicari's "The Principles of Hindu Law of Inheritance", page 835, and J. C. Ghose's Hindu Law', page 1006. Even the Kayasthas of Bihar were held to be Sudras only by the Calcutta High Court in *Raj Coomar Lal* v *Bisesuar Dayal* (3). On the other hand, the Allahabad High Court had doubted the correctness of the above decision at any rate as regards the "twelve castes of Kayasthas of Upper India such as the North Western Provinces and Oudh". See *Tulshi Ram* v. *Bihari Lal* (4).

The judgment under notice, having regard to the conflict of views and the obvious importance of the question affecting a large and influential community, proceeds to deal with the matter with reference to the original sources dealing with the origin, the tradition and the history of the community and also the social position and occupation of the Kayasthas. The examination of the original authorities cited in the judgment can hardly lead to any other conclusion than that the Kayasthas were originally Kshatriyas and were recognised as such by Hindu society.The Kayasthas of Bihar observe the ceremonies in connection with marriages, deaths and births according to vedic rights that obtain in the case of regenerate classes. In the light of the materials which are marshalled in the judgment there can be no doubt that the Kayasthas of Bihar and Upper India who owe allegiance to Benares school of Hindu Law and the Mitakshara certainly belong to the twice-born classes and cannot be relegated to the position of Sudras.

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1. (1916) 20 C W N 901.
2. (1926) L R 47 I A 140.
3. (1884) 10 C 688.
4. (1890) I L R 12 A 328.

LAKSHMI NARAIN ACHARI *v.* MUTHU BHAGAT, I L R 49 All. 636.

The language of S. 73, Civil Procedure Code, is far from satisfactory, but there can be no doubt that the procedure under that section is far from appropriate for deciding the validity and extent of a mortgage claim even summarily. The Code contemplates a subsequent mortgagee who is a party to the suit on the prior mortgage to have his rights determined and protected in the action itself. It may be that by not so getting protected, he does not lose his right against the mortgagor or against the balance proceeds [*Barhamdeo Prasad* v. *Tara Chand* (1)]. A mortgagee who has not been made a party has no grievance because his rights cannot be affected by the proceedings. If he is a first mortgagee, then also his rights cannot be affected. The only persons whose claims may be affected by any hasty distribution under S. 73 are the second mortgagee who has beccome a party but has not got his rights protected or a subsequent mortgagee *pendente lite.* No doubt the Court will have to make some order in respect of their claims. The proper order to make possibly might be, on the *prima facie* case being made out, to keep the amount necessary to meet the claim of the mortgagee in court deposit leaving the parties to establish their rights in suit. S. 73, Civil Procedure Code, had no application to the case in hand, as here there were no money decree-holders applying for execution, so that the order of the Court could be only one under O. 34, R. 13. Under that rule also, the same principle should be the guide and it would not be a proper order to make to hand over the proceeds to the second encumbrancer without the consent of the mortgagor. The mortgagor also would not be entitled to the money, as the charge of the mortgagee would be transferred to the amount.

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TAMIZ BANO *v.* NAND KISHORE, I L R 49 All. 645.

There is authority for the position that court can pass a decree against a legal representative personally if he is in possession of sufficient assets [*Nathuram Siviji Sett* v. *Kutti Haji* (2)]. When such a claim is made, all the questions, *viz.,* whether the defendant has assets, whe-

1. (1913) L R 41 I A 45 : I L R 41 C 654 : 26 M L J 243 (P C).
2. (1897) I L R 20 M 446.

ther he has administered them properly and nothing remains for the satisfaction of the debt woulud appropriately arise in such a suit and the court would have to decide them. Similarly, where a claim is made against an executor *de son tort*, possession of the assets itself is the cause of action and all those questions would naturally arise for discussion and determination. But when the suit is brought against the legal representative in his representative capacity for a decree against him out of the assets in his hands, there is no authority for holding that, at the defendant's option, the suit can be converted into a sort of administrative action when the extent of the assets and liabilities can be determined in the suit without the safeguards involved in an administration action. When a suit is brought in the first instance against the debtor himself and he dies pending the suit, in *Narayanaswami Naick* v. *Seshama Raju* (3), it was held that the decree could be only one against the assets and not one against the representative personally and rightly so, because in such a case the question of the existence of assets and liabilities does not properly arise. The contrary view would convert every suit on a bond, promissory note, or other claim, however trivial, into an administration action involving a general investigation into the affairs of the deceased. We think the view of Mr. Justicc Mukerjee is more in accordance with principle than the view of the other learned Judge, though the further principles laid down by the latter as regards the rights and liabilities of the heir in the administration of the estate seem to be sound. Apart from cases to which the Probate and Administration Act applies, the heir is not bound to pay the debts *pro rata* and he is entitled to a right of retainer and, if the debts that he has paid or those in respect of which he is entitled to a right of retainer are equivalent to the value of the assets in his possession, his liability ceases and he is not required further to show that he has actually sold the assets for the purpose of administration, nor does there seem to be any liability on the part of the heir to reduce the estate into possession.

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3. (1907) 18 M L J 36.

MUSSAMMAT LACHHMI *v*. MUSSAMMAT BHULLI, I L R 8 Lah. 384 (F B).

We invite attention to this elaborate judgment of the Full Bench of the Lahore High Court which deals with a point on the law of *res judicata* on which there has been a considerable divergence of views among the High Courts. Where two cross suits between the same parties are disposed of by a common judgment but two separate decrees are drawn up, the question frequently arises whether appeals should be filed against both the decrees. Where only one appeal is filed, is the hearing of the appeal barred by *res-judicata* by the existence of the other decree which has not been appealed from and which has become final? This judgment deals exhaustively with all the various authorities which have considered the question and the majority of the Judges hold that, neither by the terms of S. 11 of the Civil Procedure Code nor on general principles of *res-judicata,* is it necessary to appeal against both the decrees. It would be a great technicality to set up the very judgment which is appealed against, as operating by way of *res-judicata,* to prevent the hearing of the appeal. The Madras High Court has always been holding against the doctrine of *res-judicata* in such cases. *Panchanada Velan* v. *Vaithianatha Sastrial* (1), *Ramasami Chetty* v. *Karuppan Chetty* (2). Part of the reasoning on which the Madras Full Bench decision proceeds is no longer sustainable in view of the decision of the Privy Council in *Naganna* v. *Venkatappayya* (3) explaining the exact scope and limits of the doctrine of "subordinate and dependent judgments" and re-affirming the rule in *Marriot* v. *Hampton* (4). The Allahabad and Calcutta High Courts have been taking conflicting views and the question remains unsettled notwithstanding the latest Full Bench judgment of the Allahabad Court in *Ghansham Singh* v. *Bhola Singh* (5). The judgment under notice is a useful contribution to the discussion on the question which can, however, by no means be taken to have been quite settled yet.

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SAI *v*. THE CROWN, I L R 8 Lah. 496.

The Criminal Procedure Code amendment Act of 1923 has abolished the sanction procedure under the old section 195. The

1. (1905) I L R 29 M 333. 16 M L J 63 (F B).
2. (1915) 29 M L J 551.
3. (1923) L R 50 I A 301 : I L R 46 M 895 : 45 M L J 657 (P C).
4. (1797) 7 Term Rep. 269 : 101 E R 969.
5. (1923) I L R 45 A 506 (F B).

Court or the public officer concerned has now to make a complaint in writing. Except that the complainant need not be examined by the Magistrate and that postponement of issue of process against the accused under S. 202 is not applicable to such complaints when made by a Court, the complaint by the Court will be in the other respects like any other complaint by a private person. A Court which makes a complaint under S. 476, will therefore be incompetent to try that case as no person can be a complainant and a Judge at the same time in the same matter. This disability will on general principles extend also to hearing of appeals arising out of such complaint. Whether or not S. 556 of the Code applies to such cases, there can be no doubt that the same officer cannot be the complainant and the appellate Court. It may be noted in this connection that the intention of the legislature is also made clear by the repeal of S. 477 of the old code. A Sessions Judge who preferred a complaint under S. 476 cannot therefore himself try the case on appeal. It may not follow however that the successor in office is under a similar disability.

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DHANNA MAL AND OTHERS v. MOTI SAGAR, L R 54 I A 178 : I L R 8 Lah. 573 : 52 M L J 663 (P. C.).

It must now be taken to be well-established that a finding in a prior litigation, which was adverse to the party who succeeded in the same, could not be *res-judicata* against him in a later litigation. *Midnapur Zamindari Company* v. *Naresh Narayan Roy* (1), *Ramasami Reddi* v. *Marudai Reddi* (2). The decision to the contrary in *Veerasami Mudali* v. *Palaniappan* (3) does not appear to be sound, and the distinction based on the discretionary order as to costs of the earlier suit being based on the adjudication of rights therein is not convincing. It is also equally well-estbalished that it is only the findings of the ultimate Court of final appeal in the earlier suit on which the decree is based that could be *res-judicta* in subsequent proceedings and that the other findings of the lower courts should be deemed to be unnecessary for the disposal of the earlier case and such matter is not heard and finally decided within the meaning of S. 11, Civil Procedure Code. *Sheosagar Singh* v. *Sitarani Singh* (4), *Abdulla Ashgar Ali Khan* v. *Ganesh Dass* (5)

1. (1920) L R 48 I A 49 : I L R 48 C 460 (P C).
2. (1923) I L R 47 M 453 : 46 M L J 198.
3. (1923) 46 M L J 515. 4. (1897) L R 24 I A 50 : I L R 24 C 616 (P C)
5. (1917) L R 44 I A 213 : I L R 45 C 442 : 34 M L J 12 (P C).

An issue which in terms is left open by the judgment in a prior suit cannot also be regarded as having been finally decided, whatever the implications of the decree in the earlier case may be An instance of this class of cases is the decision of the Privy Council in *Parsotam Gir* v. *Narbada Gir* (1). The decision in the case now under review is also based on similar principles. It will be noted that the judgment of the District Judge in the first instance purported to proceed on the basis that decision on the question of permanent tenancy set up by the defendants was irrelavant and unnecessary for deciding on the alleged right of the plaintiff to enhance the rent. The order on the review application made to the same Judge clearly showed that he understood his previous judgment not to decide the question of permanent tenancy one way or other. Their Lordships point out that the order on the review application must be taken to be in substance, a withdrawal of the tentative pronouncement in the original judgment and there was no concluded opinion of the Judge on the question of permanent tenancy in the earlier litigation. The case will therefore come within the principle of the ruling in *Parsotam Gir* v. *Narbada Gir* (1), however difficult it may be to uphold the increase of rent decreed in the earlier suit without reference to the main question of the nature of the tenancy.

The principle of the present decision will however be entirely inapplicable to cases where the judgment and decree in the earlier suit do decide disputed issues between the parties and there is merely an opinion of the judge embodied in the judgment that such decision will not be *res-judicata* in later proceedings. In such cases the decision of the Judge will be disregarded as an erroneous opinion on a point of law as regards the effect of his judgment in later proceedings and such prior decision will have their normal and full operation as conclusive adjudications binding on the parties, notwithstanding the rider attempting to qualify their legal effect.

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NIAMAT RAI *v.* DIN DAYAL, L R 54 I A 211 : I L R 8 Lah. 597 : 52 M L J 729 (P C).

The recent decisions of the Privy Council in *Sri Krishna Das* v. *Nathu Ram* (2) and in the case under notice, have to be welcomed as liberalising the administration of Hindu Law

1. (1899) L R 26 I A 175 : I L R 21 A 505 (P C).
2. (1926) L R 54 I A 79 : I L R 49 A 149 : 52 M L J 720 (P C).

with regard to the sales of joint family properties under the Mitakshara System. Where transactions of sale of joint family properties by managers are challenged after a lapse of time, the difficulties of proving the application of the entire sale proceeds for purposes binding on the joint family are in practice found to be considerable. These decisions lay down authoritatively that the validity of such sales cannot be made to depend upon principles of strict accounting. The real question in such cases is "whether the sale itself is justified by necessity". If the purchaser has acted honestly, if the existence of a family necessity for sale is made out and the price is not unreasonably low, the purchaser is not bound to account for the application of the price. *Gauri Shankar* v. *Jiwan Singh* (3). Where, however, the evidence makes it clear that a substantial part of the consideration was applied for the discharge of previous debts binding on the family, it is clear that the sale cannot be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. Even in such cases the purchaser cannot be directed to pay over once again such balance of consideration as was not proved to have been so applied. In the decision under notice, the manager was held justified in selling the family properties for the purpose of discharging family debts and for raising funds to carry on a family business. It may be useful to remember, as their Lordships point out, that the question whether a family business should be closed down or carried on by raising more moneys is essentially a matter for the manager to decide and a purchaser or lender is not obliged to canvass the matter and decide at his peril according as the venture proves successful or otherwise. Their Lordships also reject a contention that the validity of the sale should be judged only with reference to the conditions at the time of negotiation and not with reference to the conditions at the time of the actual execution of the sale. Some of the considerations which may affect the validity of such sales, notwithstanding the above decisions, will be found detailed in 52 M L J 44 (N I C).

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[END OF VOLUME LIII.]

3. (1927) 53 M L J 786 (P C).

THE

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## NOTES OF RECENT CASES.

*Wallace, J.*
*21st April, 1927.* } C. R. P. No. 1336 of 1925.

*Civil Procedure Code, S. 115 and O. 38, R. 8—Attachment before judgment—Claim preferred—Claim decided adversely to claimant without decision as to question of possession—Interference in revision.*

Where certain properties were attached before judgment and claim was preferred to those properties and where the claim was decided adversely to claimant without the question of possession of properties being gone into :

*Held*, in revision, that the order of the Lower Court must be set aside and the case sent back for disposal on the question of possession as that was the question to be decided in such a case.

*E. Krishnamurthi* for Petitioner.

*A. C. Sampath Aiyangar* for Respondent.

N. S.

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*Odgers & Venkatasubba Rao, JJ.*
*25th April, 1927.* } C. M. A. No. 382 of 1924.

*Hindu Law—Father—Debtor—Decree against son—Son if could be adjudicated an insolvent.*

A son of a Hindu father cannot be adjudicated an insolvent in respect of his father's debts with regard to which a decree is obtained against him on the basis of the operation of pious obligation. 41 M 824 followed. 49 M. 217 distinguished.

*A. Viswanatha Aiyar* for Appellant.

*Watrap Subramania Aiyar* for Respondent.

N. S.

N. R. C.

*The Chief Justice, Beasley & Wallace, JJ.* *27th April, 1927.* — Referred Case No. 2 of 1926.

*Income-tax Act, S. 2 (1)—Agricultural income—Income of a lessee of land used exclusively for the manufacture of salt from sea water.*

The manufacture of salt from sea water cannot be said to be income from land and it is not agricultural income exempt from assessment.

*T. V. Venkatarama Aiyar* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*Wallace, J.* *28th April, 1927.* — C. R. P. No. 113 of 1926.

*Railways Act, S. 72—Risk Note Form B—Goods lost during transit—Liability of Railway Company—Burden of proof.*

Where certain goods entrusted to a Railway Company under the new Risk Note Form B for loss during transit the *onus* is on the consignor to prove that the loss was due to negligence or misconduct of the Railway servants or the authorities. The new risk note has not made any change in this respect.

*Vere Mockett* for Petitioner.

*S. Rangasami Aiyangar* for Respondent.

N. S.

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*Devadoss and Madhavan Nair, JJ.* *29th April, 1927.* — C. M. S. A. No. 132 of 1925.

*Civil Procedure Code, S. 47 & O. 21, R. 58—Decree against karnavan—Attachment of properties alleged to belong to tarwad—Claim by a member of tavazhi—If falls within S. 47.*

Where a decree was passed against a karnavan in his capacity as karnavan and some properties were attached by the decree-holder as belonging to the karnavan and a claim was preferred by some of the members of the tarwad that the property attached belonged to their tavazhi, the question whether the claim fell under S. 47 or under O. 21, R. 58 though the petition was filed under both the sections was referred to a Full Bench.

*K. Krishna Menon*, Counsel for Appellant.

*K. P. Ramakrishna Aiyar* for Respondent.

N. S.

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*Waller, Madhavan Nair and Jackson, JJ.* *29th April, 1927.* — Cr. R. C. No. 753 of 1926.

*Criminal Procedure Code, Ss. 517 and 520—Appeal—Forum.*

The words " Court of appeal " in S. 520 of the Cr. P. C. refers only to the Court hearing appeals ordinarily under the provisions of the Code and not to a Court invested with appellate powers by virtue of

delegation. An appeal against the order of a Sub-Magistrate passed under S. 517 lies to the District Magistrate and not to the Sub-Divisional Magistrate who has by virtue of delegation jurisdiction to hear appeals from Sub-Magistrates.

*K. Desikachariar* for Petitioner.

*K. S. Jayarama Aiyar* for Respondent.

*The Public Prosecutor* for the Crown.

N. S.

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*Devadoss & Jackson, JJ.*
*2nd May, 1927.*
S. A. No. 1324 of 1924.

*Hindu Law—Re-union—Persons who were not parties for original partition.*

Under Hindu Law there can be a re-union only among members who were parties to the original partition. 30 C. 725, 33 C. 374 and 35 C. 71 referred to.

*G. Lakshmanna* for Appellant.

*S. Varadachariar* for Respondent.

N. S.

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*Odgers & Curgenven, JJ.*
*3rd May, 1927.*
C. M. A. No. 141 of 1923.

*Civil Procedure Code, S. 47 and O. 21, R. 16—Death of assignee decree-holder—Jurisdiction of executing court to enquire whether the assignee was a benamidar.*

The executing court has got jurisdiction to enquire on the death of the assignee decree-holder whether the assignee was a benamidar for a third party.

*C. S. Venkatachariar* for Appellant.

*S. Varadachariar* for Respondent.

N. S.

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*Odgers & Curgenven, JJ.*
*3rd May, 1927.*
C. M. A. No. 395 of 1926.

*Hindu Law—Joint trading family—Insolvency of manager—Powers of the manager if vest in the Official Receiver.*

The following question was referred to their Lordships to the opinion of a third Judge under S. 98, Civil Procedure Code :

Where the manager of a joint Hindu trading family is adjudicated an insolvent his powers of alienating the family properties vest in the Official Receiver.

*B. Somayya* for Appellant.

*V. S. Narasimhachariar* for Respondent.

N. S.

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*Devadoss & Jackson, JJ.*
*4th May, 1927.*
S. A. No. 957 of 1924.

*Hindu Law—Minor—Sale by* de facto *guardian for discharging binding debt.*

Where the property of a Hindu minor was sold by his father's cousin who was the nearest male agnate for the purpose of discharging a mortgage debt of the minor's father :

*Held*, that the sale was not voidable by the minor on attaining majority on the ground that the father's cousin was only a *de facto* guardian.

*C. S. Venkatachariar* for Appellant.

*N. Sivaramakrishna Aiyar* for Respondent.

N. S.

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*The Chief Justice and Wallace, J.* *4th May, 1927.* — O. S. A. No. 51 of 1926.

*Letters Patent (Madras), cl. 15—Judgment—Order refusing to revoke leave to sue.*

An order refusing to revoke leave to sue on the Original Side is not a judgment and no appeal lies under clause 15. 35 M. 1 followed.

*S. Srinivasa Aiyangar, V. Radhakrishnayya, A. Krishnaswami Aiyar, P. Kameswara Rao* and *S. Venkatesa Aiyangar* for Appellant.

*C. Rama Rao* and *V. C. Gopalaratnam* for Respondent.

N. S.

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*The Chief Justice, Beasley and Wallace, JJ.* *4th May, 1927.* — R. C. No. 8 of 1926.

*Income-tax Act, Ss. 4, 6, 10 and 13—Money-lending business —Foreign advances—Accrued interest—Liability for assessment.*

Where an assessee adopts the mercantile system for the purposes of his business, he cannot go back upon the system and ask that he should be assessed on the cash basis. Where an assessee was doing money-lending business at Rangoon and had a Branch at Penang and his account books showed that a certain sum was entered in the Rangoon Accounts as an advance made to the Penang firm and there was also of a credit entry as interest due in respect of this advance

*Held*, that the sum of interest was assessable under S. 4, cl. (1) of the Act.

*K. S. Krishnasami Aiyangar* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*The Chief Justice, Beasley and Srinivasa Aiyangar, JJ.* *5th May, 1927.* — R. C. No. 20 of 1926.

*Income-tax Act, Ss. 33 and 34—Scope and applicability.*

Where the Commissioner of Income-tax attempts to initiate re-assessment proceedings afresh acting under S. 33, he is bound by the one year's limitation period specified in S. 34. The Commissioner's powers under S. 33 are not untrammelled by any time-limit. But there is no time-limit for the Commissioner to revise the assessment proceedings of the Income-tax Officer or Assistant Commissioner.

*Vere Mockett* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*Waller & Madhavan Nair, JJ.* *6th May, 1927.* } C. M. S. A. No. 47 of 1925.

*Civil Procedure Code, O. 34, Rr. 4 and 6—Mortgage decree—Construction—Decree in terms of compromise—If preliminary or final decree—Limitation Act, Art. 182, cl. (5)—Application for final decree if can be a step-in-aid of execution.*

In a suit on a mortgage the matter was compromised and a decree was passed in terms of the compromise as follows :—

(1) Upon the 1st defendant paying to the plaintiff or into Court on or before the 30th April, 1916 the sum of Rs. 250 with interest thereon at the rate of 12 per cent. per annum from this date to the date of payment the plaintiff do deliver to the 1st defendant or to such person as he may appoint in this behalf all documents in his possession or power relating to the properties.

(2) That in default of payment of the sums aforesaid on or before the date specified the rights of the 1st defendant over the said properties or a sufficient portion thereof be sold.

(3) That if the net proceeds of sale be found insufficient to pay the sums aforesaid in full the 1st defendant do personally pay the amount of the balance to the plaintiff.

The question arose whether this is a preliminary decree and if so whether it should be followed by a final decree and secondly whether the three applications for final decree which were dismissed for default could be construed as steps-in-aid of execution under Art. 182, cl. (5) of the Limitation Act.

*Held*, the decree was a compromise decree in pursuance of the terms of the compromise and does not require a final decree.

34 Cal. 886 and 44 All. 666 followed.

*Held also* that the subsequent applications for final decree could be treated as steps-in-aid of execution as the applications were made to enable the decree-holder to realise the fruits of his decree.

*K. P. Krishna Menon* for Appellant.

*K. P. Ramakrishna Aiyar* for Respondent.

N. S.

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*Ramesam & Cornish, JJ.* *18th July, 1927.* } S. A. No. 1910 of 1926.

*Madras District Municipalities Act, S. 9—Election held under the preceding section—Meaning of—If includes an election contemplated to be held.*

The words " Election held under the preceding sections " in S. 9 of the Madras District Municipalities Act do not include an election contemplated to be held but not in fact held.

*Dr. Swaminathan* and *K. Desikachari* for Appellant.

*T.M. Krishnaswami Aiyar* and *Sankara Menon* for Respondent.

N. S.

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N. R. C,

*Wallace, J.*
*20th July, 1927.* } Cr. Rev. Case No. 86 of 1927.

*Penal Code, S. 79—Judgment-debtor returning from Court—Arrest by process-server—Legality.*

A judgment-debtor who was returning from Court whither he had been on Court business was arrested by process-server.

*Held*, that the process-server was guilty of wrongful arrest.

*M. Krishna Bharathi* for Petitioner.

*The Public Prosecutor* for the Crown.

N. S.

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*Wallace, J.*
*20th July, 1927.* } Cr. Rev. Case No. 76 of 1927.

*Criminal Procedure Code, Ss. 106 and 123—Order for security for good behaviour and sentence of imprisonment in case security is not furnished—Legality.*

A Court has no power to pass an order for security for good behaviour and sentence of imprisonment in case security is not furnished. The order for imprisonment must be passed only after the expiry of the time fixed for furnishing security, if security is not furnished by that time.

*A. V. Narayanaswami Aiyar* for *C. S. Swaminathan* for Petitioner.

*The Public Prosecutor* for the Crown.

N. S.

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*Srinivasa Aiyangar & Reilly, JJ.*
*21st July, 1927.* } S. A. No. 1172 of 1924.

*Pensions Act—Rules framed by the Board of Revenue—R. 4—Collector's certificate—Effect of—Fresh cause of action.*

The Collector's certificate does not give a new cause of action in the case of malikana pension but only removes an impediment in the way of filing a suit in respect of political pensions which is otherwise prohibited under the Pensions Act.

*Per Srinivasa Aiyangar, J. (Reilly, J. contra).*—The Collector's certificate issued under R. 4 of the rules framed under the Board of Revenue can only be in respect of land revenue and will not cover the case of malikana pension.

*K. P. M. Menon* and *P. Govinda Menon* for Appellant.

*A. Krishnaswami Aiyar* and *D. A. Krishna Wariar* for Respondent.

N. S.

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*Madhavan Nair & Curgenven, JJ.*
*21st July, 1927.* } C. R. P. No. 1156 of 1925.

*Madras District Municipalities Act, S. 93 (3)—Transfer of Officer from one Municipality to another—Demand of profession tax by both Municipalities—Legality.*

A Government Officer residing within one Municipality was transferred to another place during the same year. The Municipality of the place where he was transferred sent a demand notice for profession tax and the same was paid. The other Municipality also served a demand notice for profession tax.

*Held*, that he was not bound to pay the tax under S. 93 (3).

*T. S. Nataraja Pillai* for Petitioner.

*S. R. Dikshit* for Respondent.

N. S.

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*Srinivasa Aiyangar & Reilly, JJ.* *22nd July*, 1927. — S. A. No. 227 of 1925.

*Limitation Act, Art.* 47—*Scope of—Criminal Procedure Code,* S. 146—*Order under—If falls within Art.* 47.

An order under S. 146 of the Cr. P. Code was passed by a Magistrate delivering possession of the properties to a Receiver. Subsequently the defendants in the present suit obtained a decree from the Civil Court declaring their title to the properties. On the strength of this decree they got possession of the properties from the Magistrate. Subsequently this Civil Court decree was upset in Second Appeal wherein the High Court held that the present plaintiffs were entitled to the properties. The plaintiffs thereupon brought the present suit to recover possession of the properties from the defendants.

*Held*, (1) that Art. 47 of the Limitation Act was not applicable to the suit and the suit was not barred though it was brought more than three years from the date of the Magistrate's order giving possession to the defendants, as the order was not passed in the interests of peace under the Cr. P. Code, but was passed only in accordance with the declaration of the defendants' right by the Civil Court; (2) that the cause of action for the suit was not the Magistrate's order delivering possession to the defendants but the declaration of plaintiffs' title by the High Court in second appeal; and (3) that the order of the Magistrate under S. 146 of the Cr. P. Code was not an adverse order which ought to be set aside under Art. 47.

26 M. 410 followed.

10 L. W. 637 referred to.

*K. V. Venkatasubramania Aiyar* for Appellant.

*K. Rajah Aiyar* for Respondent.

N. S.

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*Waller, J.* *28th July*, 1927. — C. S. No. 354 of 1913.

*Civil Procedure Code, O.* 21, *R.* 2, *cl.* 3—*Scope of—Court passing the decree—Application to, for transfer of a decree—If precluded from recognising uncertified adjustment.*

The prohibition contained in O. 21, R. 2, cl. 3 of the C.P. Code in respect of an uncertified adjustment applies only to the court executing the decree. Where therefore an assignee of a decree applies to the High Court as the Court which passed the decree for transmission of

decree to another Court for purpose of execution the judgment-debtor is not precluded from pleading an uncertified adjustment.

*V. Ramasami Aiyar* for Judgment-debtor.

*K. Chakravarthi* for Execution Creditor.

N. S.

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*Madhavan Nair & Curgenven, JJ.* *28th July*, 1927. — R. C. No. 17 of 1926.

*Village Courts Act, S. 5—Decree by a village court—Power of District Munsif to transfer decree to another court—Provisions of Civil Procedure Code if applicable to decrees of village court.*

The District Munsif having jurisdiction over a place where the village court is situated has no power to transfer a decree of the village court to another District Munsif's Court wherein the defendant resides, as the provisions of the C. P. Code do not apply to proceedings under the Village Courts Act except in so far as they have been made applicable by the Act itself.

46 M. 734 followed.

*B. Somayya* and *K. Venkatarama Raju* amicus curiae for the parties.

N. S.

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*Madhavan Nair & Curgenven, JJ.* *29th July*, 1927. — L. P. A. No. 98 of 1926.

*Civil Procedure Code, S. 102—Second appeal—Suit of a Small Cause nature—Suit by Shrotriemdar for recovery of cess against Kudivaramdar—Provincial Small Cause Courts Act, Art.* 13.

A suit by Shrotriemdar to recover arrears of cess from the Kudivaramdar does not fall under Art. 13 of the Provincial Small Cause Courts Act. Such a suit is one of a Small Cause nature and, if the valuation of it is less than Rs. 500, no second appeal lies under S. 102 of the C. P. Code.

*L. S. Veeraraghava Aiyar* for Appellant.

*A. V. Viswanatha Sastri* for Respondent.

N. S.

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*Ramesam & Cornish, JJ.* *29th July*, 1927. — C. M. A. No. 183 of 1925.

*Civil Procedure Code, Ss. 47 and 92—Scheme decree—Executability.*

Whether a clause in a scheme decree is executable or not will depend upon its nature. The question is one of intention and will not depend upon the presence of express provision in the scheme that enforcement of the clause might be applied for in the execution except where the relief asked for in execution would be one coming within the specific reliefs enumerated in S. 92, C. P. Code, the scheme provisions can be enforced in execution.

Case-law reviewed.

*S. Varadachariar* for Appellant.

*K. Bhashyam Aiyangar* for Respondent.

N. S.

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*Wallace, J.*
*28th July*, 1927. } Cr. Rev. Case Nos. 916 to 919 of 1926.

*Indian Copyright Act (III of 1914)—Owner of copyright—Who is—Registration—When necessary.*

An author of a work is *prima facie* the owner of its copyright under Act III of 1914.

Even under Act XX of 1847 and Act XXV of 1867 while registration was a necessary condition precedent to the maintenance of the special proceedings provided for by the said Acts, it was not a condition precedent to the existence of the copyright itself, or to the maintenance of criminal proceedings for unlawful infringement of the copyright not provided for by the said Acts.

36 L. T. 704, (1914) 2 Ch. 566, (1913) M. W. N. 58 referred to.

*Ch. Raghava Rao* for Petitioners.

*The Public Prosecutor* for the Crown.

*V. Govindarajachariar* and *K. L. Narasimha Rao* for Respondents.

N. S.

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*Madhavan Nair* &
*Curgenven, JJ.*
*29th July*, 1927. } C. M. S. A. No. 87 of 1925.

*Limitation Act, Art. 182 (5)—Step-in-aid—Oral application for extension of time to file encumbrance certificate.*

An oral application by decree-holder for extension of time to file encumbrance certificate is not a step-in-aid of execution.

*P. Somasundaram* for Appellant.

*P. Chenchiah* for *P. Venkataramana Rao* for Respondents.

N. S.

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*Srinivasa Aiyangar* &
*Reilly, JJ.*
*1st August*, 1927. } S. A. Nos. 1192 and 1193 of 1924.

*Hindu Law—Maintenance of widow of undivided brother—Whether can be made a charge on entire family properties.*

Where a widow of an undivided brother claimed maintenance, the maintenance can be made a charge on the whole of the joint family properties and not merely on the undivided share of the deceased brother.

27 Mad. 45 explained.

25 I.C. 759 followed.

*A. Srirangachariar* for Appellant.

*T. M. Krishnaswami Aiyar* and *R. Somasundaram Aiyar* for Respondents.

N. S.

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*Srinivasa Aiyangar* &
*Reilly, JJ.*
*1st August*, 1927. } A. S. No. 402 of 1923.

*Hindu Law—Adoption by widow—Widow succeeding to her husband as trustee—Divesting of trust estate.*

A widow succeeding to her husband as a trustee and subsequently adopting a boy pursuant to authority conferred by her husband is divested of the trust estate as of any other property inherited by her. It is not correct to say that the rule of divestiture by virtue of an adoption does not apply to property inherited by the widow in which she has no beneficial interest. Statement of Ganapathy Iyer in his work on Endowments at page 477 held wrong.

The case in 20 Mad. 162 (P.C.) on which it was based distinguished.

51 M. L. J. 652 distinguished.

*T. V. Venkatarama Aiyar* and *T. V. Ramanatha Aiyar* for Appellants.

*A. Krishnaswami Aiyar* and *Ch. Raghava Rao* for Respondents.

N. S.

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*Ramesam & Cornish, JJ.*
*2nd August*, 1927. } O. S. A. No. 124 of 1926.

*Indian Succession Act* (1925), *S.* 301—*Scope—Application for the removal of an executor—If bars suit—Discretion—Exercise of.*

The effect of the enactment of S. 301 of the new Indian Succession Act is to bar the institution of a regular suit for the removal of an executor.

The discretion to be exercised by the High Court under S. 301 is not an arbitrary one but must be exercised judicially.

*K. S. Krishnaswami Aiyangar* for Appellant.

*S. Doraiswami Aiyar* for Respondent.

N. S.

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*Phillips, Offg. C.J. and Ananthakrishna Aiyar, J.*
*3rd August*, 1927. } O. S. A. No. 100 of 1926.

*Partnership—Dissolution—Non-publication of notice—Persons dealing with the firm without notice—Rights of.*

Persons who deal with a firm will not be affected by its dissolution if no public notice has been given of the fact of dissolution unless they themselves had notice of the dissolution. A retiring partner will not be relieved from liability if he omits to give a public notice of retirement to the constituents of the partnership firm both new and old.

*A. Suryanarayana* for Appellant.

Respondent not represented.

N. S.

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*Curgenven, J.*
*4th August*, 1927. } C. R. P. No. 822 of 1927.

*Madras District Municipalities Act—Judge conducting enquiry under—If a " Court ".*

A Judge who holds an enquiry into the validity of an election held under the Madras District Municipalities Act is a " Court " and not a *persona designata.*

*K. Rajah Aiyar* and *K. S. Desikan* for Petitioner.

N. S.

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*Ramesam and Cornish, JJ.*
*29th July, 1927.* } A. S. No. 348 of 1923.

*Court-Fees Act, S. 7 (v) (a) and (b)—Suit for recovery of specific plot—Plot forming part of a survey number but not separately assessed to revenue—Court-fee payable.*

The proper court-fee payable on a plaint in a suit to recover possession of a specific plot forming part of a survey number but not separately assessed to revenue is on the proportionate assessment of the plot and not on its market value.

*A. Krishnaswami Aiyar* and *B. C. Seshachela Aiyar* for Appellant.

*K. Bhashyam Aiyangar* and *V. C. Veeraraghavan* for Respondent.

N. S.

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*Madhavan Nair and Curgenven, JJ.*
*3rd August, 1927.* } C. M. A. No. 454 of 1926.

*Evidence Act, S. 92 (4)—Registered mortgage deed—Contemporaneous unregistered agreement providing for the discharge of the mortgage—Admissibility—Sub-mortgagee—Rights and liabilities of.*

An unregistered document executed contemporaneously with a registered mortgage deed and providing for the mode of discharge of the mortgage is admissible in evidence.

43 M. 803 referred to.

A sub-mortgagee has the same rights as an assignee of the mortgage and consequently must give credit to the amounts received by the mortgagee.

*K. S. Varadachari* for Appellant.

*S. Rangachari* for Respondent.

N. S.

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*Srinivasa Aiyangar and Reilly, JJ.*
*4th August, 1927.* } S. A. No. 433 of 1926.

*Limitation Act, S. 5—Sufficient cause—Error of law—Appellate Side Rules, Rule 20—Clerical error—Omission to include a respondent's name due to mistake in copying.*

An error of law made by a Vakil may be "sufficient cause" within S. 5 of the Limitation Act.

45 C. 94 (P. C.) followed.

The mistake made by a Vakil's clerk in omitting a respondent's name when copying it from the judgment of the Lower Court, there being two judgments, one before and the other after remand, is a "clerical mistake" within the meaning of Rule 20 of the Appellate Side Rules.

*Advocate-General* for Appellant.

*K. S. Krishnaswami Aiyangar* for Respondent.

N. S.

N R C

*Waller, J.*
*5th August, 1927.* } C. S. No. 103 of 1926.

*Limitation Act, Arts. 62 and 96—Consignment of cotton seeds by Railway—Collection of surcharges by the Railway—Suit for recovery of surcharges.*

The plaintiff instituted a suit for recovery of surcharges alleged to have been legally collected from the plaintiff in respect of consignment of cotton seeds by the Railway Company on the ground that cotton seeds came within the definition of 'fodder' within the meaning of the Railways Act of 1921.

*Held,* that the mistake alleged by the plaintiff being as to the meaning of the word 'fodder' was one relating to the construction of enactment and such a mistake of law would not be a mistake within the Art. 96 of the Limitation Act. Only mistakes of fact will come within the scope of the Article.

*K. V. Ramachandra Aiyar* for Plaintiff.

*Advocate-General* for Defendant.

N. S.

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*Srinivasa Aiyangar and Reilly, JJ.*
*5th August, 1927.* } S. A. No. 978 of 1924.

*Madras Estates Land Act, Ss. 125 and 132—"Sale"—If includes sale held by Civil Courts—Rent decree—Transfer to Civil Court—Sale—Encumbrances if extinguished.*

The "sale" mentioned in S. 125 of the Madras Estates Land Act means a sale held under the provisions of S. 111, *i.e.,* a sale by a Revenue Court.

Where a Revenue Court decree is transferred to the Civil Court and properties were sold in execution, the sale does not extinguish the encumbrances on the properties.

*G. Lakshmanna* for Appellant.

*P. Somasundaram* for Respondent.

N. S.

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*Curgenven and Anantha-krishna Aiyar, JJ.*
*8th August, 1927.* } S. A. No. 1366 of 1921.

*Evidence Act, S. 92 (4)—Simple mortgage—Oral agreement for the discharge of the mortgage amount by allowing the mortgagee to enter into possession—Admissibility.*

An oral agreement between the mortgagor and the mortgagee in a simple mortgage by which the mortgagee was to enter into possession and remain in possession till the amount due to him was discharged out of the usufruct is admissible in evidence.

*G. Ramakrishna Aiyar* for Appellant.

*P. Somasundaram* for Respondent.

N. S.

*Jackson and Tiruvenkata Achariyar, JJ.*
*9th August, 1927.*

C. M. S. A. No. 6 of 1926.

*Civil Procedure Code, O. 21, R. 84—Forthwith—Meaning of—Failure of bidder to pay the initial deposit of 25 per cent.—Re-sale on fresh proclamation after 2 months—Validity.*

In execution of a decree certain properties were sold on 1st September, 1923. The highest bidder failed to pay the 25 per cent. deposit on that day. The next two days were holidays and on the 4th the non-payment was reported to the Court which ordered a re-sale after the issue of a fresh proclamation. The re-sale on fresh proclamation was held on 5th November and resulted in deficiency in price. The decree-holder applied under O. 21, R. 84 of the Civil Procedure Code to recover the deficiency in price from the previous bidder.

*Held*, by Jackson, J. (Tiruvenkata Achariyar, J., holding *contra*) that the re-sale, though it was held after 2 months from the date of the prior sale, was not in contravention of O. 21, R. 84 of the Civil Procedure Code and was not invalid.

*Ch. Raghava Rao* for Appellant.

*B. Somayya* for Respondent.

N. S.

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*Curgenven and Anantha-krishna Aiyar, JJ.*
*9th August, 1927.*

S. A. No. 1420 of 1924.

*Hindu Law—Partition suit by minor—Birth of son subsequent to the institution of suit—Plaintiff's share if reduced.*

The birth of a son subsequent to the institution of a partition suit by a member of a joint family does not have the effect of reducing the plaintiff's share even where the plaintiff happens to be a minor suriving by a next friend. Though it may depend on the Court's discretion whether to decree a partition in favour of a minor or not, yet once the Court makes its mind to decree a partition, the severanee of the co-parcenary dates back to the institution of the suit itself, even as in the case of an adult co-parcener suing for partition.

48 Mad. 465 and 26 L. W. 125 followed.

*Ch. Raghava Rao* and *A. Sundaram Aiyar* for Appellants.

*K. Kameswara Rao* for Respondent.

N. S.

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*Srinivasa Aiyangar and Reilly, JJ.*
*10th August, 1927.*

S. A. No. 1150 of 1924.

*Transfer of Property Act, S. 58 (c)—Mortgage by conditional sale—Non-specification of date for repayment of amount—Effect.*

There is nothing in the definition of mortgage by conditional sale in S. 58 (*c*) of the Transfer of Property Act which requires that a certain date must be fixed for repayment of the amount borrowed. Consequently the non-specification of such a date in the document does not show that it is not a mortgage by conditional sale.

*A. Krishnaswami Aiyar* and *N Sivaramakrishna Aiyar* for Appellant.

*B. Somayya* for Respondent.

N. S.

*Curgenven and Anantha-krishna Aiyar, JJ.* *10th August*, 1927. — S. A. No. 1402 of 1924.

*Words—Santhathi—Meaning of—If includes adopted son.*

The word "Santhathi" means ordinarily "heirs", and will include an adopted son.

*S. Ramaswami Aiyar* for Appellant.

*P. N. Appuswami Aiyar* for Respondent.

N. S.

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*Madhavan Nair and Curgenven, JJ.* *11th August*, 1927. — C. M. S. A. No. 25 of 1925 and C. R. P. No. 326 of 1925.

*Civil Procedure Code, O. 21, R. 89—Lessee of immoveable property—Right to apply under.*

A lessee of immoveable property is entitled to apply under O. 21, R. 89 of the Civil Procedure Code for the setting aside of the sale of the property held in execution of a decree.

*P. Chenchiah* for Appellant.

*V. S. Narasimhachar* for Respondent.

N. S.

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*Madhavan Nair and Curgenven, JJ.* *11th August*, 1927. — C. R. P. No. 382 of 1927.

*Madras District Municipalities Act, S. 49, cl. (vi)—Rules for the conduct of elections—Rule 31—Interpretation by Government of the sections of the Act—Finality—Jurisdiction of Civil Court if barred.*

The finality under Rule 31 of the Rules for the Conduct of Elections under the District Municipalities Act attaches only to the interpretation by the Government of the Rules made under the Act and not of the sections of the Act and consequently the interpretation put by the Government on a section of the Act is not binding on the Civil Court nor is the jurisdiction of the Civil Court barred in respect of it.

*B. Sitarama Rao* and *S. R. Muthuswami Aiyar* for Petitioner.

*K. V. Krishnaswami Aiyar* and *N. Swaminathan* for Respondent.

N. S.

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*Jackson, J.* *11th August*, 1927. — Cr. R. C. No. 285 of 1927. Cr. R. P. No. 253 of 1927.

*Criminal Procedure Code, S. 522—Order by Sub-Magistrate—If appealable.*

Where an order of delivery of property was passed by a Sub-Magistrate some time after conviction, and an appeal was filed separately against that order

*Held*, no appeal lay.

Full Bench ruling in 53 M. L. J. (R. C.) 2=25 L. W. (R. C.) 76 considered.

*M. Appa Rao* for Petitioner.

*The Public Prosecutor* for the Crown.

N. S.

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*Srinivasa Aiyangar and Curgenven, JJ.*
*16th August, 1927.*

S. A. No. 720 of 1924.

*Limitation—Suspension of—Grounds not specified in the Limitation Act—Amounts advanced by karnavan to the tarwad—Cause of action whether suspended so long as karnavan was alive.*

The Limitation Act is exhaustive and complete and no general principle based upon equity can be invoked apart from the provisions of the Act to save the bar of limitation. The cause of action is not suspended simply because the right to sue and be sued is united in the same person. The cause of action for a suit in respect of debts advanced by a karnavan to his tarwad is not suspended during the lifetime of the karnavan.

*K. P. M. Menon* for Appellant.

*T. R. Ramachandra Aiyar* for Respondent.

N. S.

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*Ramesam and Cornish, JJ.*
*16th August, 1927.*

A. S. No. 349 of 1923.

*Inam—Construction—Devadayam—Grant to institution or to individual—Resumption of inam and re-assessment on ryotwari tenure—Validity—Suit to set aside resumption—Limitation—Limitation Act, Art. 14—Grant to trustee himself after resumption—Effect—Trusts Act, S. 88—Property if becomes trust property*—Bona fide *purchaser for value—Rights of.*

The inclusion of the word "Devadayam" in an inam deed is not conclusive in favour of dedication. The classification of inams as Devadayam includes both grants to a religious institution as such and also grants to individuals who may or may not be officials in religious institutions.

A grant to a person in his capacity as an official of a religious institution is a grant to the institution itself. Where a substantial part of the income goes to a mosque or a temple, the grant is one to the institution. In all other cases a grant to a named person will not be a grant to the institution, but to the grantee as a *persona designata.*

A grant to a person as 'Mulla' does not necessarily mean a gift to a mutawalli or to a mosque.

Where the inam title deed is not forthcoming, and where the Inam Register is not clear, usage can and must be looked into for determining the nature of the grant.

Where from 1874 till 1909 certain properties were dealt with as ancestral property by way of usufructuary mortgages,

*Held*, that the property was granted only as a service inam to a named person and not to the institution in which those services were directed to be performed.

Where for failure to perform the services the Board of Revenue resumed the inam and re-assessed the property on Ryotwari tenure,

*Held,* that the resumption was *intra vires* and that Art. 14 of the Limitation Act applied to the suit to set aside the resumption or declare the resumption invalid.

N. R. C

42 M. 161 dissented from.

There is no fresh cause of action by the mere issue of a patta after resumption.

*Quare*: In a case where after resumption the properties are granted to the trustee himself, whether the principle of S. 88 of the Trusts Act applies ?

42 M. 161, doubted.

Assuming S. 88 of the Trusts Act applies to such a case, the property will not become trust property in the absence of a declaration of Court that it is so.

38 M. 329 applied.

And *bona fide* purchasers for value without notice will have superior rights before it is again declared as trust property.

*T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar* and *N. C. Krishna Aiyar* for Appellant.

*The Government Pleader (P. Venkataramana Rao), P. R. Ganapathy Aiyar, Ch. Raghava Rao* and *V. Krishna Mohan* for Respondents.

N. S.

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*Curgenven, J.*
*16th August*, 1927. } C. R. P. No. 1212 of 1925.

*Civil Procedure Code, S. 73—Assets paid over to other decree-holders on date of application—Suit proper remedy.*

Where on the date of an application for rateable distribution, the assets have been paid over to other decree-holders, the proper remedy of the aggrieved decree-holder is by a suit under S. 73 (2), Civil Procedure Code.

23 A. 313 (P.C.) applied to.

*V. Ganapati Ayya* for Petitioner.

*N. Sivaramakrishna Aiyar* for Respondent.

N. S.

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*Wallace, J.*
*17th August*, 1927. } C. R. P. No. 1001 of 1926.

*Civil Procedure Code, O. 1, R. 10 and O. 22, R. 4—Death of defendant—Legal representative not impleaded in time—If can be added as parties under O. 1, R. 10.*

The provisions of O. 1, R. 10, Civil Procedure Code, cannot be resorted to so as to override the provisions of O. 22, R. 4. Consequently a Court cannot add as parties to the suit the legal representatives of a deceased defendant who have not been impleaded as such within the time allowed by law.

*G. Lakshmanna* for Petitioner.

*V. Suryanarayana* for Respondent.

N. S.

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*Jackson and Tiruvenkata Achariyar, JJ.*
*18th August*, 1927.

C. R. P. No. 1276 of 1925.

*Specific performance—Decree for—Power of Court to extend time fixed in the decree.*

The Court has power to extend the time fixed in the decree for specific performance of a contract.

Case-law reviewed.

*N. C. Vijayaraghavachari* for Petitioner.

*P. Satyanarayana* for Respondent.

N. S.

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*The Offg. Chief Justice, Beasley and Ananthakrishna Aiyar, JJ.*
*19th August*, 1927.

A. S. No. 226 of 1923.

*Court Fees Act (V of* 1922)*—Maintenance suit filed under the old Act of* 1870*—Appeal under the new Act—Valuation—Forum of appeal—New Act if retrospective.*

A suit for maintenance was filed while the Court Fees Act of 1870 was in force and was valued at a sum over Rs. 10,000. At the time of the appeal, the new Act of 1922 had come into force. According to the valuation under the new Act, the value would be less than Rs. 5,000.

*Held*, that the appeal lay to the High Court and not to the District Court, as the right of appeal which was a valuable right could not be taken away by the new Act which was not retrospective.

*T. Rangachariar* and *E. V. Sundara Reddi* for Appellant.

*K. V. Krishnaswami Aiyar* and *N. S. Srinivasa Aiyar* for Respondent.

N. S.

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*Srinivasa Aiyangar, J.*
*19th August*, 1927.

C. R. P. Nos. 38 to 47 of 1927.

*Provincial Small Cause Courts Act, Ss.* 23 *and* 25*—Suit for rent based on attornment—If depends on proof of title to immoveable property—Order directing return of plaint—When justifiable—Revision—Interference.*

A Small Cause suit was filed by the usufructuary mortgagee for rent on the ground that the defendants had attorned to him and were paying rent but subsequently failed to pay it. The Court ordered the plaint to be returned on the ground that it had no jurisdiction to entertain it as the defendants disputed the plaintiff's title to the properties. Thereupon the plaint was presented to the District Munsif's Court but it was returned on the ground that the properties exceeded Rs. 3,000 in value and consequently beyond the pecuniary jurisdiction of the Munsif. Thereupon the plaint was presented to the Sub-Court, but that Court again returned it on the ground that it had no jurisdiction to entertain it as the value of the rent sued for was below Rs. 3,000.

*Held*, (1) that the order of the Small Cause Court returning the plaint was wrong as the claim for rent was based on attornment and did not depend upon proof of title ;

N. R. C.

(2) that the order returning the plaint was an "order in a case decided" within the meaning of S. 25 of the Act.

*T. S. Venkatesa Aiyar* for Petitioner.

*F. S. Vas* for Respondent.

N. S.

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*Srinivasa Aiyangar and Curgenven, JJ.* *22nd August*, 1927. } S. A. No. 1343 of 1924.

*Contract Act*, S. 96—*If applies to unascertained goods.*

The vendor's lien specified in S. 96 of the Contract Act can be exercised even in the case of unascertained goods.

L. R. 8 Chancery Appeals 289 referred to.

*L. A. Govindaraghava Aiyar* for Appellant.

*S. Varadachariar* and *K. S. Champakesa Aiyangar* for Respondent.

N. S.

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*Madhavan Nair and Jackson, JJ.* *24th August*, 1927. } C. M. S. A. No. 128 of 1925.

*Civil Procedure Code*, S. 47—*Attachment in execution of decree—Subsequent lease by judgment-debtor—Lessee if a "representative"—Appeal.*

A lessee from the judgment-debtor subsequent to the attachment of the properties in execution of the decree is a "representative" of the judgment-debtor within the meaning of S. 47 of the Civil Procedure Code.

21 A. 20 followed.

*Ch. Raghava Rao* for Appellant.

*K. Kameswara Rao* and *A. Ramasami Aiyangar* for Respondent.

N. S.

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*The Offg. Chief Justice, Beasley and Anantha-krishna Aiyar, JJ.* *1st September*, 1927. } C. M. S. A. No. 132 of 1925.

*Civil Procedure Code*, S. 47—*Decree against karnavan of Malabar tarwad—Attachment of tarwad properties in execution—Objection by some members of the tarwad on the ground that they belong to their own tavazhi and not to the tarwad—Order on—If falls under section.*

Where properties are attached as belonging to the tarwad in execution of a decree against the karnavan of a Malabar tarwad and some members of the tarwad file an objection to the attachment on the ground that the properties belong to their own tavazhi and not to the tarwad, it does not fall under S. 47 of the Civil Procedure Code, as the objection was agitated by the members in a capacity different from the one in which the karnavan was impleaded and made liable under the decree.

23 M. 195 and 31 I. C. 393 followed.

24 M. 658 and 30 M. 215 overruled.

*K. Krishna Menon* for Appellant.

*K. P. Ramakrishna Aiyar* for Respondent.

N. S.

*The Offg. Chief Justice, Ramesam and Beasley, JJ.*
*5th September*, 1927.

Ref. Case No. 16 of 1926.

*Indian Income-tax Act, Ss.* 2 (1) *and* 4 (3) (8)—*Agricultural income—Lease of trees—Income from toddy tapped from trees.*

The income from toddy tapped from trees by the lessee of the trees only (and not of the land on which the trees stand) is not "agricultural income" within the meaning of S. 2 (1) of the Income-tax Act.

*K. S. Jayarama Aiyar* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*The Offg. Chief Justice, Ramesam and Beasley, JJ.*
*5th September*, 1927.

Ref. Case No. 7 of 1926.

*Indian Income-tax Act, S.* 50—" *Tax was recovered* "—*Meaning of.*

The words " Tax was recovered " in S. 50 of the Income-tax Act do not mean the refund to the assessee of the tax already paid by him but mean the collection of the tax from the assessee.

*Vere Mockett* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*Madhavan Nair and Jackson, JJ.*
*6th September*, 1927.

C. M. A. No. 256 of 1925.

*Transfer of Property Act, S.* 59—*Usufructuary mortgage—Redemption of portion—Subsequent oral agreement substituting other items as security—Validity.*

The plaintiff had executed a usufructuary mortgage in 1889 of the A Schedule properties for Rs. 700 for a period of 7 years. Subsequently he redeemed a portion of it on payment of Rs. 100. Later on an oral agreement was entered into by which the C Schedule properties were accepted by the mortgagee as substituted security for the A Schedule properties for a fresh period of 6 years. The plaintiff instituted a suit for redemption.

*Held*, that the oral agreement amounted to an oral mortgage of the C Schedule properties which was invalid under S. 59 of the T. P. Act and consequently the suit must fail.

*V. Ramasami Aiyar* for *C. Padmanabha Aiyangar* for Appellant.

*K. S. Venkatraman* for Respondent.

N. S.

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*Madhavan Nair and Jackson, JJ.*
*6th September*, 1927.

C. M. S. A. No. 37 of 1926.

*Malabar Tenants Act (I of* 1900), *Ss.* 5 *and* 6—*Decree for redemption—Appeal by tenant for enhanced compensation—Decree by Appellate Court for enhanced compensation—Ejectment of tenant by first Court's decree—If tenant entitled to mesne profits after ejectment till payment of enhanced compensation.*

Where in a decree for redemption and ejectment against a tenant, the tenant was awarded compensation by the Munsif's Court and the tenant was ejected on payment of compensation, but he filed an appeal and got a higher amount for compensation and claimed mesne profits between the time of ejectment and payment of the enhanced amount.

*Held*, that the tenant was not entitled to mesne profits but only to interest on the enhanced amount from the time of ejectment.

45 M. L. J. 323 followed.

*K. P. Ramakrishna Aiyar* for Appellant.

*A. Sivarama Menon* for Respondent.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*6th September*, 1927.

C. M. A. No. 253 of 1927.

*Mahomedan Law—Hiba-bil-ewas—Sale—Transfer by husband to wife in satisfaction of dower which had been fixed—Civil Procedure Code, O. 41, R. 23—Appeal from order of remand—Issues not dealt with by the Appellate Court—If can be argued.*

Where the dower amount due by a Mahomedan husband to his wife has been already fixed and the husband transfers property to his wife in satisfaction of this amount, the transfer amounts to a sale according to Mahomedan Law. But, if the transfer is in satisfaction of unascertained dower, the transfer is not a sale.

5 A. 65 referred to.

In an appeal from an order of remand, the appellant can only argue whether the order of remand is a legal one; he is not entitled to support the decree of the first Court on grounds and issues not dealt with by the lower Appellate Court which passed the order of remand.

*V. Thiagaraja Aiyar* for Appellant.

*M. A. Aseem* for Respondent.

N. S.

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*The Offg. Chief Justice, Ramesam and Beasley, JJ.*
*6th September*, 1927.

Ref. Case No. 21 of 1925.

*Indian Income-tax Act, S. 3—Association—Combination of persons for taking in auction toddy shops and sharing the profits—Liability for assessment to income-tax.*

A combination of persons who enter into an arrangement to take in auction, work and share the profits of toddy shops and share the profits does not contravene any rule of the Abkari Act and is not an illegal association, and consequently is assessable to income-tax in respect of the profits derived by it.

*T. R. Ramachandra Aiyar* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*Madhavan Nair and Jackson, JJ.*
*6th September*, 1927.

C. M. S. A. No. 151 of 1925.

*Civil Procedure Code, O. 21, Rr. 16 and 18—Assignment of decree—Judgment-debtor if can plead the absence of consideration for the assignment—Subsequent decree not between same parties—Right to set off.*

It is not open to the judgment-debtor to raise the plea of the absence of consideration for the assignment of the decree, where the decree-holder admits the assignment.

There is no right to set off under O. 21, R. 18, C. P. C., where the subsequent decree is not between the same parties in the same character.

*K. S. Champagesa Aiyangar* for Appellant

*B. Somayya* for Respondent.

N. S.

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*Srinivasa Aiyangar and Curgenven, JJ.*
*6th September*, 1927.

S. A. Nos. 1082 of 1924 and others.

*Company—Voluntary winding up—Bond in the name of the company—Assignment by person purporting to act as liquidator but not properly appointed—Validity.*

The assignment of a bond which stands in the name of a company by a person purporting to act as the liquidator in the voluntary winding up of the company is not valid, if he was not properly, or in fact, appointed as liquidator.

*The Advocate-General* and *S. Ramasami Aiyar* for Appellant.

*P. N. Marthandam Pillai* for Respondent.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*7th September*, 1927.

L. P. A. No. 67 of 1924.

*Hindu Law—Minor—Agreement to sell immoveable property by guardian of the minor—Agreement for the benefit of the minor—Specific performance—If can be decreed.*

A contract to sell immoveable property belonging to a minor by his guardian is not specifically enforceable against the minor, even though it is for the benefit of the minor.

42 M. 185 distinguished.

39 C. 232 (P. C.) followed.

*B. Sitarama Rao* and *N. S. Srinivasa Aiyar* for Appellant.

*M. Patanjali Sastri* for Respondent.

N. S.

N R C

*Jackson, J.*
*8th September*, 1927. } Cr. A. No. 397 of 1927.

***Opium Act, S. 9—Criminal intention—If necessary—License given for removing opium on one day—Removal of greater portion on that day—Removal of the balance on subsequent day—Effect.***

License issued for removing opium on a certain day does not permit the removal, on the next day, of a portion of it which was not removed the previous day.

Under S. 9 of the Opium Act it is not necessary to prove a criminal intention.

*J. C. Adam (Public Prosecutor)* for the Crown.

*M. Patanjali Sastri* for Accused.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*8th September*, 1927. } S. A. Nos. 1550 & 1551 of 1922.

*Madras Estates Land Act, S. 77—Rent not previously ascertained—Suit under the section—If maintainable.*

The fact that the rate of rent has not been previously ascertained is no bar to the institution of a suit for rent under S. 77 of the Madras Estates Land Act. The Court should determine the proper rate of rent in the suit itself.

21 L. W. 42 followed.

*Sir K. V. Reddi* for Appellant.

*V. Govindarajachari* for Respondent.

N. S.

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*Ramesam and Cornish, JJ.*
*12th September*, 1927. } O. S. A. No. 58 of 1926.

*Arbitration—Award—Misconduct of umpire—Refusal to state a case to High Court on question of law—Taking independent legal advice.*

A refusal, by the umpire, to state a case to the High Court on a question of law arising in the arbitration proceedings does not amount to legal misconduct, but, if the umpire takes independent legal advice, it will amount to legal misconduct.

*Nugent Grant* and *K. S. Krishnasami Aiyangar* for Appellant.

*Vere Mockett* for Respondent.

N. S.

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*The Offg. Chief Justice, Beasley and Ananthakrishna Aiyar, JJ.*
*12th September*, 1927. } O. S. A. No. 16 of 1925.

*Indian Succession Act, S. 187—Unprobated will—If can be relied upon in defence.*

A defendant who relies upon an unprobated will in defence to a suit by the heir-at-law is trying "to establish his right as executor or

legatee " within the meaning of S. 187 of the Indian Succession Act and this is prohibited by the section.

*K. S. Krishnasami Aiyangar* and *K. Bhashyam Aiyangar* for Appellant.

*C. Venkatasubbaramiah* for Respondent.

N. S.

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*The Offg. Chief Justice and Srinivasa Aiyangar, J.*
*13th September*, 1927.

A. S. No. 339 of 1923.

*Civil Procedure Code, S. 98—Suit for accounts—Decree—Appeal—Judges agreeing as regards all items except one but disagreeing as regards the one item—Effect.*

In an appeal from the decree in a suit for accounts, both the Judges agreed that a number of items disallowed by the Lower Court should be allowed but with regard to one item they differed.

*Held*, that the result of this difference was that the decree of the Lower Court should be set aside in respect of the items which, both the Judges agreed, should be allowed and confirmed in respect of the item as regards which they differed.

The word " opinion " in S. 98 (1) does not mean opinion on all the points raised in the appeal.

*C. S. Venkatachari* and *V. K. Srinivasa Aiyangar* for Appellant.

*T. V. Muthukrishna Aiyar, K. Narasimha Aiyangar, S. Panchapagesa Sastri* and *V. C. Veeraraghavan* for Respondent.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*13th September*, 1927.

A. S. Nos. 353 and 27 of 1924.

*Hindu Law—Partition deed—Construction of—" A and his wife and her heirs "—Whether operates as a gift* in praesenti *or an executory estate—Validity of—Provision for altered succession—If opposed to Hindu Law.*

Where in a partition deed between father and son it was provided that the property allotted to No. 1 individual should be enjoyed by him absolutely, and the property allotted to No. 2 individual should be enjoyed by him and his heirs, and where it was further provided that in the properties allotted to No. 1 individual, individual No. 2 or his heirs shall have no rights and that the properties that are allotted to the first individual should belong to him, his named wife and her heirs.

*Held*, that such a provision that the property should go to No. 1 individual, his wife and her heirs being in variance with the line of succession recognised by Hindu Law is invalid.

*Held* further that the wife of individual No. 1 did not get any interest in the property either jointly with her husband or after his death

contingent on the property being undisposed of and that the term " to her and her heirs " was merely declaratory of the intention of the parties.

27 M. 498 distinguished.

*S. Jagadisa Aiyar* and *V. Rajagopala Aiyar* for Appellants.

*T. M. Krishnaswami Aiyar*, *K. Aravamuthu Aiyangar* and *N. Swaminathan* for respondents.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*13th September*, 1927.

A. S. No. 414 of 1925.

*Limitation Act, Art.* 132—*Mortgage bond—Construction of—Provision for the whole amount becoming due in default of payment of interest—" On demand"—Whether demand necessary—Exercise of option—Evidence of.*

In a mortgage bond executed on 22nd January, 1908, it was provided that " the mortgagors should pay before the 22nd January of each year the interest arrived at on the principal amount at the rate of 9 per cent. per annum and pay the principal sum within a period of 5 years from the date of mortgage." In default of payment of interest or principal on such due dates they agreed to the mortgagee adding to the principal sum the interest due each year from the date of default and recovering the " total amount " with interest at the said rate without regard to the due date for payment of principal, whenever the mortgagee required, by proceeding against the mortgagors and the hypotheca. The mortgagor did not pay any interest on the due date but the interest up to 15th June of 1909 was paid on the basis of enhanced rate from the due date and also on the principal as well as the interest. Another sum was paid towards the principal.

*Held*, (1) that the words " whenever you require " made the demand essential and a demand was necessary before the cause of action could accrue and the limitation began to run only from the date of demand.

" On demand " does not mean forthwith or immediately.

39 M. 981 followed.

53 I. A. 185=I.L.R. 48 A. 457 relied upon.

(2) that under the deed it was open to the mortgagee to exercise his option to call in the principal amount and that on the exercise of such option limitation began to run from that date ;

(3) the fact of payment of interest on the footing of enhanced rate up to the date of payment even before the due date for the second instalment arrived imported a demand.

Further the fact of payment of interest before the due date for principal also imported a demand.

14 Ch. D. 687 *In re Rutherford* followed.

9 L. W. 479 distinguished.

*K.V. Krishnaswami Aiyar* and *S. Jagadisa Aiyar* for Appellants.

*A. Krishnaswami Aiyar*, *M. Patanjali Sastri* and *R. Somasundaram Aiyar* for Respondents.

N. S.

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*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*
*12th September*, 1927.

S. A. Nos. 1, 2 and 10 of 1925.

*Hindu Law—Alienation by limited owner—Improvements made by alienees—Suit to recover possession with mesne profits by reversioner—If reversioner entitled to mesne profits.*

Where a limited female owner of an estate under Hindu Law alienated some properties absolutely and the alienees *bona fide* believing that they have absolute title made improvements on the property and the reversioner subsequently brought the suit to recover the property together with mesne profits till date of recovery of possession,

*Held*, that the plaintiff was not entitled to recover mesne profits which are in any way attributable to the improvements effected by the alienees whose right to the value of improvements had not been questioned.

*T. R. Ramachandra Aiyar* and *K. P. Ramakrishna Aiyar* for Appellants.

*G. Krishnaswami Aiyar* and *A. Parameswara Aiyar* for Respondents.

N. S.

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*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*
*12th September*, 1927.

S. A. No. 1861 of 1925.

*Hindu Law—Joint family—Father—Alienation—Major portion of the consideration for necessity—Rights of minor son.*

Where all the joint family properties were already in the possession of strangers under *othis* and the father and another adult coparcener sold the properties for a sum of Rs. 580 and it was found by the Court below that only Rs. 325 out of this amount went in discharge of debts binding on the joint family,

*Held*, that the sale as a whole must be upheld.

49 A. 149 (P. C.) referred.

*T. M. Ramaswami Aiyar* for Appellant.

*V. Rajagopala Aiyar* for Respondent.

N. S.

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*Madhavan Nair and Curgenven, JJ.*
*13th September*, 1927.

C. M. A. No. 83 of 1927.

*Madras Local Boards Act—Rules under—Rule 1—"Election"—Meaning of.*

The word " election " has not been defined in the Madras Local Boards Act or in the Rules framed thereunder. It does not mean a process of selection. It embraces the whole procedure whereby an elected member is returned whether or not it be found necessary to have a polling.

Where three persons offered themselves for election to a vacant seat but, on the date fixed for the scrutiny of nomination papers, the

nomination paper of one of them was rejected and later on another withdrew with the result that the third person was declared elected;

*Held*, that this amounted to an "election" within the meaning of Rule 1 of the Rules framed under the Madras Local Boards Act.

51 M. L. J. 193 not followed.

45 M. L. J. 23 and 47 M. L. J. 792 followed.

*E. V. Sundara Reddi* for Appellant.

*L. S. Veeraraghava Aiyar* for Respondent.

N. S.

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*The Offg. Chief Justice and Reilly, J.*
*14th September*, 1927.

O. S. A. No. 77 of 1926.

*Hindu Law—Adoption by widow—Devise of properties in her favour by her husband—Validity of adoption.*

Where a widow in whose favour all the properties had been devised absolutely by her deceased husband adopted a son,

*Held*, that the adoption was valid.

An adoption is not invalid merely because there is no property over which it can take effect.

*T. M. Krishnaswami Aiyar* for Appellant.

*V. C. Gopalaratnam* for Respondent.

N. S.

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*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*
*16th September*, 1927.

S. A. No. 1410 of 1924.

*Specific Relief Act, S. 27 (c)—Contract for sale by landlord—Suit for specific performance and possession—Tenants in possession—Decree for possession if can be given.*

The plaintiff sued to enforce specifically a contract for sale entered into by a landlord and to recover possession of the properties which were in the actual possession of the tenants. The tenants did not raise the plea of want of notice to quit. They had repudiated the title of the landlord before the institution of the suit.

*Held*, that the tenants had, by repudiating the landlord's title, become liable to be evicted by the landlord and therefore, under S. 27 (c) of the Specific Relief Act, the plaintiff could exercise that right of the landlord and evict the tenants.

*Obiter* : The tenants are not entitled, as a matter of right, to take up the plea of want of notice to quit in second appeal when they have not raised it before.

*A. Krishnaswami Aiyar* and *K. Venkatrama Raju* for Appellant.

*K. Kameswara Rao* for Respondent.

N. S.

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*The Offg. Chief Justice, Ramesam and Beasley, JJ.*
*16th September*, 1927.

Ref. Case No. 13 of 1926.

*Indian Income-tax Act, Ss. 4 and 10 (9)—Partnership—Assessee doing business with headquarters outside British India but having branches in British India—Agreement with employees in the branches to give them a share of the profits at the end of two*

*years as their remuneration—If amounts to a partnership—Share of the profits if can be deducted as expenses under* S. 10 (9).

A merchant doing business had his headquarters in a place outside British India. He had branches at several places within British India. He entered into an agreement with his employees in the respective places of business whereby they were to serve for two years and receive a share of the profits at the end as remuneration for their services. The agreement provided that the employer was to have the sole control of the business and that the employees were liable to dismissal. There was no provision that the employees should bear any loss incurred in the business.

*Held*, (1) that the agreement did not constitute a partnership and the assessee was therefore liable to pay tax on the entire profits and not merely on the share of the profits reserved to him under the agreement, and (2) that the assessee was not entitled to deduct the share of the profits due to the employees as expenses under S. 10 (9) of the Income-tax Act.

*The Advocate-General* for Assessee.

*M. Patanjali Sastri* for Commissioner of Income-tax.

N. S.

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*The Offg. Chief Justice and Reilly, J.*
19*th September*, 1927.

O. S. A. No. 70 of 1926.

*Hindu Law—Joint family property—Presumption—Acquisitions of father.*

Where in a Hindu family consisting of father and son the father acquired a Mitta and also other properties and there was no direct evidence before the Court that the said Mitta was treated as joint family property by the father,

*Held*, that from the fact that the other properties were so treated, no presumption arises that this property was also treated as joint family property so as to give an interest therein to the son.

*S. Muthia Mudaliar* and *T. D. Srinivasachari* for Appellants.

*R. N. Aingar* for Respondents.

N. S.

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*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*
19*th September*, 1927.

S. A. No. 1455 of 1924.

*Registration Act*, S. 50—*Scope of.*

To attract the provisions of S. 50 of the Registration Act, two conditions are necessary. One is that the earlier unregistered conveyance and the later registered conveyance must be both seeking to take effect, not completed transactions. Consequently, where an unregistered sale has been taken by the party as a completed sale and the sale coupled with the delivery of possession has been given effect to completely long before the subsequent registered sale deed is executed, S. 50 does not apply. Secondly, the earlier unregistered deed must be a valid document operative in law, that is, operative even without registration.

*T. M. Krishnaswami Aiyar* for Appellant.

*V. Krishnamachari* for Respondent.

N. S.

*The Offg. Chief Justice and Reilly, J.*
*20th September*, 1927.
A. S. No. 138 of 1924.

*Contract Act, S. 70—"Lawful"—Meaning of—Person making the payment if should be interested in making it.*

The word "lawful" in S. 70 of the Contract Act indicates that the payment should have been made *bona fide*. It is not necessary that the person making the payment must have been interested in making the payment.

*K. V. Krishnaswami Aiyar* and *S. Venkatrama Aiyar* for Appellant.

*C. Padmanabha Aiyangar* for Respondent.

N. S.

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*Waller, J.*
*20th September*, 1927.
I. P. No. 278 of 1926.

*Indian Trusts Act, S. 66—Trustee mixing up trust property with his own—Rights of beneficiary—Charge.*

Where a trustee wrongfully mixes up the trust funds with his own funds, the beneficiary is entitled to a first charge upon the entire funds so mixed up.

*The Advocate-General* for Creditor.

*S. Doraisami Aiyar* for Official Assignee.

N. S.

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*Madhavan Nair and Curgenven, JJ.*
*23rd September*, 1927.
Cr. R. C. No. 372 of 1927.

*Criminal Procedure Code, S. 197—Tahsildar acting as a polling officer for a municipal election—Complaint against, of falsifying election records by tampering with voting papers—Sanction if necessary.*

A complaint was preferred against a Tahsildar to the effect that he while acting as the polling officer in connection with a municipal election falsified or attempted to falsify the election records by tampering with voting papers.

*Held*, that previous sanction was not necessary for the lodging of the complaint as the Tahsildar while acting as the polling officer was not acting in his official capacity as Tahsildar.

Two conditions under S. 197 must be fulfilled before a sanction is required. (1) That the person charged with the offence should be a public officer who was not capable of being removed from his office except by the Government. (2) That the offence alleged to have been committed must have been done in discharge of his official duties.

*P. Venkataramana Rao* for Tahsildar.

*The Public Prosecutor* for the Crown.

N. S.

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*Wallace and Tiruvenkata Achariyar, JJ.*
*22nd September*, 1927.

A. S. No. 370 of 1923.

*Civil Procedure Code, O. 26, R. 1—Successive Commissions—Appointment of—Legality.*

Successive Commissions for the same purpose should not be ordered except where the Court thinks it necessary to discard the previous Commissioner's report in which case the first Commissioner's report is not evidence in the case.

*T. R. Ramachandra Aiyar* and *C. V. Harihara Aiyar* for Appellant.

*K. P. Krishna Menon* and *T. S. Anantaraman* for Respondent.

N. S.

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*Ramesam and Cornish, JJ.*
*23rd September*, 1927.

A. S. No. 354 of 1923.

*Civil Procedure Code, S. 92—Scheme suit—Compromise by some of the parties or death of some—Effect.*

The fact of the compromise by some of the parties to a scheme suit or the death of some of the parties does not preclude the Court in a scheme suit from deciding the question regarding the removal of some of the trustees.

*The Advocate-General* and *N. Sivaramakrishna Aiyar* for Appellant.

*T. R. Ramachandra Aiyar* and *T. S. Venkatesa Aiyar* for Respondent.

N. S.

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*Ramesam and Cornish, JJ.*
*23rd September*, 1927.

A. S. No. 355 of 1923.

*Registration Act, Ss. 17 and 49—Equitable mortgage—List of documents containing a clause at the foot that the documents were deposited as security—Registration if necessary—Oral evidence or subsequent admission—Admissibility—Evidence Act, S. 91.*

Where the defendants borrowed monies from the plaintiff on the equitable mortgage by deposit of their title-deeds and the list of the properties whose title-deeds were deposited contained a clause at the foot that the documents were deposited as security for the debt,

*Held*, that the list evidenced the bargain between the parties and itself created the mortgage and therefore required registration.

50 C. 338 (P. C.) referred to.

*Held* also that no oral evidence or subsequent admission by the defendant was admissible to prove the mortgage.

*A. Krishnaswami Aiyar* and *N. Sivaramakrishna Aiyar* for Appellant.

*S. Varadachariar* and *P. Satyanarayana Rao* for Respondent.

N. S.

N R C

*Madhavan Nair and Curgenven, JJ.*
*23rd September, 1927.*
C. M. A. No. 69 of 1925.

*Civil Procedure Code, O. 17, Rr. 2 and 3—Scope and applicability.*

Order 17, Rr. 2 and 3, Civil Procedure Code, are mutually independent and exclusive.

Per *Madhavan Nair, J.* (*Curgenven, J.*, contra).—Where the plaintiff's pleader applied for an adjournment and, on the adjournment being refused, took no further part in the hearing of the suit, and the plaintiff who was also present applied for an adjournment and, on its being refused, refused to go on with the case, and the suit was dismissed,

*Held*, that O. 17, R. 2 applied to the case and not R. 3.

41 M. 486 referred to.

*S. Varadachariar* and *K. S. Champakesa Aiyangar* for Appellant.

*V. Ramadoss* and *R. Purushottam Aiyangar* for Respondent.

N. S.

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*Srinivasa Aiyangar and Curgenven, JJ.*
*26th September, 1927.*
S. A. Nos. 252 to 257 of 1925.

*Madras Estates Land Act, S. 30—Enhancement of rent—Ryot using water from Government tank—Water rate levied from landlord by Government—Landlord's claim to include water rate in the rent—If one for enhancement.*

Their Lordships referred the following question to the decision of a Full Bench: Where a ryot uses water from a Government tank for which a water rate is levied on the landlord by the Government and also collected, whether the claim of the landlord to include this water rate in the rent due from the ryot is one for enhancement of rent within the meaning of S. 30 of the Madras Estates Land Act.

*A. Krishnasami Aiyar* for Appellant.

*K. Desikachari* for Respondent.

N. S.

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*Srinivasa Aiyangar and Curgenven, JJ.*
*26th September, 1927.*
S. A. No. 311 of 1926.

*Madras Irrigation Cess Act—Inamdar using water from Government tank—Right of Government to impose water cess.*

Where there has been no change in the Government tank or the supply channel either by way of deepening the tank or raising the bund or altering the sluices or the supply channel, the Government is not entitled to levy water cess under the Irrigation Cess Act from an inamdar on the ground that a larger extent than the mamool wet land had been cultivated with the water from the tank.

*S. Varadachariar* for Appellant.

*P. Venkataramana Rao* (*Government Pleader*) for Respondent.

N. S.

*Srinivasa Aiyangar and Anantakrishna Aiyar, JJ.* }
*27th September*, 1927. } S. A. No. 892 of 1926.

*Religious Endowment—Permanent lease—Recognition by successive trustees—Presumption of validity.*

The defendants and their predecessors-in-title have been enjoying certain temple lands on permanent lease for more than 60 years past, the origin of such leases being unknown, and several succeeding trustees recognised the said transactions as permanent leases ;

*Held*, that in the above circumstances, there was a presumption that the alienations were made for justifiable necessity and the onus of proof of the absence of such justifiable purpose lay on the trustee.

46 Bom. 481 (P. C.) and 40 Mad. 402 (P.C.) followed.

*S. Varadachariar* and *V. Balasundaram Aiyar* for Appellants.

*K. S. Desikan* for Respondent.

N. S.

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*Phillips, O. C. J. and Reilly, JJ.* }
*28th September*, 1927. } C. M. P. No. 3254 of 1927.

*Letters Patent, cl. 15—Judgment—Order remitting the report of the Official Referee back to him.*

The order of a Judge on the Original Side of the High Court remitting the report of the Official Referee back to him is not a "judgment" within the meaning of cl. 15 of the Letters Patent.

*K. S. Krishnaswami Aiyangar* for Appellant.

*Vere Mockett* for Respondent.

N. S.

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*Wallace, J.* }
*28th September*, 1927. } Cr. A. No. 224 of 1927.

*Petroleum Act, S. 5 (1)—Transport license—Halt overnight.*

Where a person who has got a license for transport of petroleum halts his consignment for a few hours overnight in a place which is not formally licensed to keep petrol, he is not guilty of an offence under S. 5 (1) of the Petroleum Act.

*K. N. Ganapathi* for Public Prosecutor.

*V. L. Ethiraj* for Accused.

N. S.

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*Srinivasa Aiyangar and Anantakrishna Aiyar, JJ.* }
*28th September*, 1927. } S. A. Nos. 979 and 1449 of 1925.

*Transfer of Property Act, S. 53—Entire consideration applied to discharge debts—Effect—Transfer to defraud creditors—Transfer partly supported by consideration—If should be set aside wholly.*

A transfer of property the consideration of which is utilised entirely in payment of debts of the transferor without any benefit being retained for the transferor may be one intended to defeat creditors.

Where a transaction in fraud of creditors is partly supported by consideration, it cannot be upheld to the extent it is supported by consideration.

30 M. 6 and 37 M. 227 referred to.

46 M. L. J. 125 dissented.

*Watrap Subramania Aiyar* for Appellant.

*S. Muthiah Mudaliar* for Respondent.

N. S.

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*Jackson, J.*
*29th September*, 1927. } C. R. P. No. 527 of 1927.

*Civil Procedure Code, O. 22, Rr. 2 and 4—Legal representative already on record—No abatement.*

Where the legal representative of a deceased party is already on record as a party O. 22, R. 2, Civil Procedure Code, applies and no application need be put in under O. 22, R. 4.

7 L. 399 and 4 C. L. J. 568 referred to.

*K. V. Krishnaswami Aiyar* for Petitioner.

*S. Varadachariar* for Respondent.

N. S.

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*Jackson, J.*
*29th September*, 1927. } C. R. P. No. 745 of 1927.

*Presidency Small Cause Courts Act, Ss. 43 and 47—Order of ejectment—Application for stay subsequently—Maintainability.*

An application for stay under S. 47 of the Presidency Small Cause Courts Act after the passing of an ejectment order under S. 43 is maintainable.

17 L. W. 179 referred to.

*T. C. A. Anandalwan* for Petitioner.

*V. Rajagopalachari* for Respondent.

N. S.

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*Phillips, O. C. J.*
*and Reilly, J.*
*30th September*, 1927. } A. S. No. 173 of 1925.

*Hindu Law—Joint family—Mingling of separate income with joint funds—Presumption of jointness—Evidence to rebut.*

Where a member of a joint Hindu family has his own separate earnings and they are mingled with the joint family funds, there is a presumption that all the properties are joint family properties and, unless he produces his accounts or other evidence to show that his earnings were kept separately, the earnings must be treated as joint family properties.

50 C. 439 (P. C.) referred to.

*C. Narasimhachariar* for Appellant.

*K. S. Krishnaswami Aiyangar* for Respondent.

N. S.

*The Chief Justice and Ramesam, J.* 
*3rd October*, 1927. } A. S. No. 152 of 1927.

*Hindu Law—Joint family business—Debts contracted by manager—Other members taking part in the management of the business—If personally liable.*

In the case of a joint family business, the other members of the family cannot be treated as partners in the business merely because they take some part in the management of the business and are not personally liable to discharge the debts contracted by the manager for the business.

*K. S. Krishnaswami Aiyangar* and *K. Narasimha Aiyangar* for Appellant.

*S. Muthiah Mudaliar* for Respondent.

N. S.

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*Srinivasa Aiyangar, J.* 
*3rd October*, 1927. } C. R. P. No. 375 of 1927.

*Limitation Act, Art.* 164—*Substituted service—If amounts to due service.*

"Due service" in Art. 164 of the Limitation Act means "personal service" and does not include "substituted service".

52 M. L. J. 512 not followed.

*P. C. Parthasarathi Aiyangar* for Petitioner.

*L. A. Govindaraghava Aiyar* for Respondent.

N. S.

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*Venkatasubba Rao, J.* 
*4th October*, 1927. } C. S. No 42 of 1927.

*Madras High Court Original Side Rules, Order V (a)—Scope of—Claim by way of indemnity—When arises—Beneficiary—Right of indemnity against trustee.*

Under Order V (*a*) of the new Original Side Rules of the Madras High Court a defendant can agitate his claim by way of indemnity against a third person arising out of the suit transaction. Cases of indemnity may arise under express contract, under implied contract, under statutory provisions, and under fiduciary relationship between the parties.

A *cestui qui trust* has a right of indemnity against the trustee for all losses occurring to him by reason of the trustee's acts amounting to breach of trust in the same way as a trustee has a right of indemnity against the beneficiary for monies spent for the benefit of the beneficiary. Such a claim of the beneficiary is not one by way of damages but one by way of indemnity.

*M. Subbaroya Aiyar* for Plaintiff.

*V. Radhakrishnayya, A. Suryanarayaniah* and *R. Tirumala Thathachariar* for Defendants.

N. S.

*Ramesam and Cornish, JJ.*
*4th October, 1927.*
A. S. No. 217 of 1923.

*Hindu Law—Widow—Decree against—When binds the reversion.*

Where in a suit against a Hindu widow as representing her husband's estate, a real defence is available but not put forward and a decree is obtained against her, it is not binding on the reversioner. It is not the law that, unless it is established that there was fraud or collusion between the plaintiff in the prior suit and the widow, the decision therein would be *res judicata* and binding on the reversioner. Gross negligence or laches on the part of the widow in not defending the suit will render the decision not binding on the reversioner.

*N. Rama Rao* for Appellant.

*G. Lakshmanna* for Respondent.

N. S.

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*Phillips and Reilly, JJ.*
*4th October, 1927.*
A. S. No. 357 of 1924.

*Interest—Damages for breach of contract—Interest if can be awarded on.*

Interest cannot be awarded upon the amount of damages for breach of contract which was agreed to by way of settlement between the parties.

51 M.L.J. 765 (F.B.) referred to.

No interest can be awarded in claims based upon a breach of contract, apart from the Interest Act.

*K. Krishnaswami Aiyangar* for Appellant.

*B. Somayya* for Respondent.

N. S.

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*Devadoss, J.*
*10th October, 1927.*
Cr. Rev. Cases Nos. 202 & 203 of 1927.

*Madras Local Boards Act, S. 166—Driver and owner of a motor bus running on a road notified not safe for traffic.*

Where a motor bus is plied for hire along a road which is prohibited by notification as not being safe for traffic, the driver of the bus as well as the owner of it both come within the purview of S. 166 of the Madras Local Boards Act.

*K. P. Ramakrishna Aiyar* for Petitioner.

*V. Balarama Aiyar* for Respondent.

N. S.

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*Srinivasa Aiyangar and Anantakrishna Aiyar, JJ.* *30th September, 1927.* — S. A. No. 152 of 1924.

*Court-Fees Act, S. 13—Disposal on a preliminary point—Partition suit—Point as to defendants' exclusive right to property and as to share of plaintiff, if the first point is found against defendants.*

Where two points for determination arose before the Lower Appellate Court in a partition suit, *viz.*, whether the defendants had acquired an exclusive right to the property in suit and what was the share to which the plaintiff would be entitled, a one third or a half share, in the event of the first point being held against the defendants, and the Lower Appellate Court decided the case against the plaintiff on the first point itself, without going into the second, and the High Court in second appeal reversed the finding of the Lower Appellate Court on the first and remanded the case to the Lower Appellate Court for final determination,

*Held,* that the Lower Appellate Court had disposed of the case on a preliminary point for purpose of S. 13 of the Court-Fees Act, and that the Court-fee paid on the second appeal memo. in the High Court could be directed to be refunded.

*Ch. Raghava Rao* for Appellant.

*B. Somayya* for Respondents.

N. S.

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*Srinivasa Aiyangar and Anantakrishna Aiyar, JJ.* *30th September, 1927.* — S. A. No. 358 of 1924.

*Compromise decree—Some of the parties minors on the date of the suit but attaining majority on the date of the decree—Decree representing as minors—Effect.*

The plaintiffs brought a suit for setting aside a compromise decree obtained against them as minors represented by their brother as guardian on the grounds that they were majors on the date of the suit and that the guardian was guilty of fraud and negligence. The first Court dismissed the plaintiffs' suit. On appeal the Lower Appellate Court found that the first plaintiff was a major on the date of the decree, if not on the date of the suit and as such that the decree was not binding on both of them.

*Held* (in Second Appeal by the defendants) (1) that a decree obtained against a person who was a minor on the date of suit but who subsequently attained majority on the date of the decree, treating him still as a minor is not void as there is no procedure prescribed in the Civil Procedure Code which compels a plaintiff to get the minor defendants who attain majority during the course of the proceedings declared as majors.

39 Mad. 1031 and 6 L. W. 272 followed.

20 M. L. T. 479 explained.

(2) that a compromise decree is on the same footing as a contract and hence when on the date of the decree one of the parties was treated as a minor while in fact he was a major, the said decree is not binding on him.

N R C

*K. Ramamurti* and *K. Kameswara Rao* for Appellant.
*B. Jagannadha Doss* for Respondent.

N. S.

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*The Chief Justice and Ramesam, J. 3rd October, 1927.* — A. S. No. 155 of 1924.

*Contract Act, S. 74—Mortgage bond—Provision for payment in instalments and simple interest—Provision for payment of balance in lump on default with compound interest at same rate.*

Where a mortgage bond provided for payment of the debt in successive instalments, for simple interest at a certain rate in the first instance, and in the event of default in the payment of any one instalment, for payment down in a lump sum of the entire balance payable with compound interest at the same rate from the date of default,

*Held*, the clause was not penal and could be enforced.

*T. Ramachandra Rao* for Appellant.
*Ch. Raghava Rao* for Respondent.

N. S.

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*The Chief Justice and Ramesam, J. 4th October, 1927.* — A. S. No. 353 of 1925.

*Hindu Law—Bequest to two persons—Joint tenants or tenants-in-common.*

A bequest to two persons who are not members of a joint Hindu family does not make them joint tenants but they take it only as tenants-in-common.

11 C. 1 (P. C.) distinguished.
23 C. 670 (P. C.) followed.
*K. Kameswara Rao* for Appellant.
*Ch. Raghava Rao* for Respondent.

N. S.

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*Jackson and Anantakrishna Aiyar, JJ. 7th October, 1927.* — S. A. No. 716 of 1924.

*Inam—Enfranchisement—Ejectment suit by enfranchisee—Onus of proof.*

Where a vetti seri inam was enfranchised and the plaintiff who bought the interest of one of the enfranchisees sued in ejectment persons in possession.

*Held*, that the onus of proving the right to eject, *viz.*, that the original grant was of both the warams, lay on the plaintiff.

49 M. L. J. 602 and 51 M. L. J. 510 followed.
44 M. 643 (P. C.) referred.
*V. Ramadoss* for Appellant.
*Ch. Raghava Rao* and *V. Krishna Mohan* for Respondent.

N. S.

*Ananthakrishna Aiyar, J.*
*10th October, 1927.*

C. R. P. No. 999 of 1926.

*Civil Procedure Code, O. 1, R. 8—Scope of.*

A Court should not refuse leave under O. 1, R. 8, Civil Procedure Code, merely on the ground that the persons interested in the trust as representing whom the plaintiffs applied for leave are not numerous, or that there is a difference prevailing among the persons. The consent of all the persons is not necessary for the purpose of instituting a representative suit.

*T.L. Venkatarama Aiyar* for Petitioner.

*T.M. Ramasami Aiyar* for Respondent.

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*The Chief Justice and Anantha-krishna Aiyar, J.*
*11th October, 1927.*

A. S. No. 8 of 1925.

*Interest—Sale of goods—Suit for price of—Whether interest payable—Ceylon Ordinance (II of 1918)—Form of promissory note—Interest column not filled up—Effect.*

The plaintiff, a dealer in rice and cement, supplied goods to defendant from time to time and got promissory notes for the price. Finally the previous promissory notes were consolidated and a final promissory note was executed in the prescribed printed form but the space for interest was not filled up. The plaintiff brought a suit for price on the dealings and on the promissory note in India.

*Held,* (1) assuming that the promissory note was invalid under the Ceylon Ordinance an action lay on the original dealings in India,

(2) that, on the construction of the promissory note, there was no contract for payment of interest as the same was negatived by the space for interest not being filled, and

(3) that, further, the plaintiff was not entitled to any interest from the date of the promissory note but only from the date of the plaint, apart from contract for such payment and the provisions of the Interest Act.

*K. S. Krishnaswami Aiyangar* and *V. Rajagopala Aiyar* for Appellants.

*M. Patanjali Sastri* and *S. Jagadisa Aiyar* for Respondents.

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*Wallace and Tiru-venkata Achariyar, JJ.*
*11th October, 1927.*

C. R. P. No. 114 of 1923.

*Madras Estates Land Act, S. 3 (2)—Estate—Post-settlement inam—Sale for arrears of revenue and purchase by Government—Effect—Grant not of the whole village—Existence of minor inams—Effect—Burden of proof.*

Where a post-settlement inam was sold for arrears of revenue and purchased by the Government,

*Held*, that, the zamindari having been put an end to by the purchase, S. 3 (2) (*a*) and (*e*) of the Madras Estates Land Act which implies the continued existence of the zamindari did not apply.

S. 3 (2) (*d*) of the Act applies even though the grant is not of the whole village due to the existence of minor inams.

Per *Wallace, J.*—Where, in a suit for ejectment, the defendant raises the plea that the lands in respect of which the suit is brought are lands in an estate and the Civil Court has no jurisdiction to entertain the suit, the initial onus of proof is on the defendant to prove that the suit lands relate to an estate. It may be that, after this initial onus is discharged, the plaintiff should establish his right to eject the defendant.

Per *Tiruvenkata Achariyar, J.*—In such a suit there is no presumption either way.

Case-law reviewed.

*S. Varadachariar* and *Ch. Raghava Rao* for Petitioner.
*A. Krishnaswami Aiyar* and *P. Satyanarayana Rao* for Respondent.

N. S.

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*Phllips and Reilly, JJ.*
*12th October*, 1927.
A. S. No. 252 of 1925.

*Word—Santhathi—If includes adopted son.*

In the case of a devise to females the word "Santhathi" does not include "adopted son" as the adoption can be made only to the husband.

*Ch. Raghava Rao* for Appellant.

*B. Somayya* and *E. Krishnamurthi* for Respondent.

N. S.

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*The Chief Justice and Anantakrishna Aiyar, J.*
*12th October*, 1927.
C. M. P. No. 2992 of 1927.

*Arbitration Act, Ss. 1 and 14—Award—When can be set aside by Court—Finding of arbitrator—Jurisdiction of Court to go into.*

Unless there has been misconduct on the part of the arbitrator or the award was improperly procured, the Court has no jurisdiction to rescind the award under S. 14 of the Arbitration Act. The Court has no power to investigate whether there is evidence to support the finding of the arbitrator or not.

Per *Anantakrishna Aiyar, J.*—The rules of evidence as laid down in the Evidence Act do not govern arbitration proceedings.

*Nugent Grant* for Appellant.

Respondent unrepresented.

N. S.

*Madhavan Nair and Reilly, JJ.*
*12th October, 1927.*
Cr. A. No. 388 of 1927.

*Indian Penal Code, S. 292 as amended by Act XVIII of 1925—Omission of the word "printed"—Effect.*

Where a person was charged, after the coming into force of Act XVIII of 1925, with having *printed* an obscene publication, and tried and convicted of an offence under S. 292, I.P.C.,

*Held*, that the word "printed" having been omitted from the Section by the Amending Act of 1925, the charge against the accused was illegal and the conviction should be set aside.

*J. C. Adam (Public Prosecutor)* for Crown.

*G. Lakshmanna* for Accused.

N. S.

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*Srinivasa Aiyangar, J.*
*12th October, 1927.*
C. R. P. No. 599 of 1927.

*Civil Procedure Code, O. 38, Rr. 5 and 6 and O. 43, R. 1 (q)—Application for attachment before judgment—Petition closed after recording the undertaking by the defendant not to alienate his properties—Appeal—If lies.*

The plaintiff applied to the Court for an order to direct the defendant to furnish security for the amount claimed in the suit or to attach his properties. The Court passed an order recording the undertaking of the defendant not to alienate his properties and closed the petition.

*Held*, that this order fell under O. 38, R. 6 (2), C. P. C., and consequently was appealable under O. 43, R. 1 (q.)

3 R. 307 and 50 C. 215 referred to.

*K. Bhashiam Aiyangar* and *T. R. Srinivasan* for Petitioner.

*N. R. Govindachari* for Respondent.

N. S.

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*Devadoss, J.*
*12th October, 1927.*
C. R. P. No. 1204 of 1925.

*Limitation Act, S. 19—Statement that debtor would pay the amount at a future fixed period—Suit filed beyond the period of limitation from the date of signing the statement but within the period of limitation from the date fixed—If barred.*

Where a debtor wrote to the creditor acknowledging that a particular amount was due to the creditor on that date and promising to pay that amount in the first week of January next.

*Held*, that a suit by the creditor filed more than 3 years from the date of the signing of the letter but within 3 years from the first week of January fixed by the letter was barred by limitation.

*P. N. Appusami Aiyar* for Petitioner.

*T. M. Ramaswami Aiyar* for Respondent.

N. S.

*Jackson and Ananthakrishna Iyer, JJ.* 12*th October*, 1927. } S. A. No. 135 of 1924.

*Registration Act, Ss.* 17 *and* 49—*Unregistered sale-deed—Admissibility to prove the nature of possession of the vendee—Mortgagee getting unregistered sale-deed—Suit for redemption of mortgage—Mortgagee if can rely upon the sale deed—Transfer of Property Act*, S. 6b.

An unregistered sale deed is admissible in evidence to prove the nature of the possession of the vendee, namely, that the vendee claimed title as absolute owner adversely to the vendor. Any unilateral assertion of hostile right by the mortgagee who enters into possession of the mortgaged properties will not have the effect of extinguishing the right of redemption of the mortgagor. But if the mortgagee takes an unregistered sale-deed from the mortgagor it will be an "act of the parties" which will have the effect of extinguishing the right of redemption under S. 60 of the Transfer of Property Act.

Case law reviewed.

*M. S. Venkatrama Iyer* for Appellant.

*C. A. Seshagiri Sastri* for Respondent.

N. S.

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*Phillips and Reilly, JJ.* 12*th October*, 1927. } A. S. No. 77 of 1925.

*Contract Act, S.* 23—*Champertous agreement—Applicability to India—Tests.*

The English law of champerty is not applicable to India. Where the defendant entered into an agreement with the plaintiff who was her relation to give to the plaintiff ¼th of the properties that she might recover in a suit by her against her brother, in consideration of the plaintiff assisting her in the litigation with money and services.

*Held*, that the agreement was not extortianate but was more in the nature of a family arrangement.

*G. Lakshmanna* for Appellant.

*Ch. Raghava Rao* for Respondent.

N. S.

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*Madhavan Nair and Reilly, JJ.* 13*th October*, 1927. } Crl. Rev. Case No. 335 of 1927.

*Indian Motor Vehicles Act, Ss.* 11 *and* 16 *and Rule* 27 (c)—*Scope of the Rule—If* ultra vires—" *Accident* "—*Meaning of.*

The word " accident " in Rule 27 (c) of the Rules framed under the motor Vehicles Act means accidents to the driver and the occupants or to the car, and does not include accidents to other cars or to the public which the driver of the motor vehicle came to know in the course of his driving. So construed, the Rule falls within the scope of S. 11 (2) (i) of the Act and is not *ultra vires.*

*B. C. Sankaranarayana* for Accused.

*K. N. Ganapati* for the Public Prosecutor for Crown.

N. S.

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*Devadoss, J.*

*13th October, 1927.*

C. R. P. No. 1356 of 1927.

*Landlord and tenant—Lease for one year—Lessee relinquishing possession before the expiry of the year—Liability for rent for the remaining period.*

Where a lease was taken for a period of one year and the lessee who had entered into possession vacated the premises after 4 months and gave a notice to the landlord that he gave up the lease, but the lessor refused to accept the termination of the lease and it appeared that the landlord had offers from other persons to take up the property on lease on higher rent but that he neglected to lease the property to such persons,

*Held*, that the landlord was not entitled to any damages against the lessee.

*P. R. Ramakrishna Iyer* for Petitioner.

*P. S. Ramachandra Iyer* for Respondent.

N. S.

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*Devadoss, J.*

*14th October, 1927.*

Crl. Rev. Case No. 401 of 1927.

*Madras City Police Act, S. 76—Scope.*

S. 76 of the Madras City Police Act is not restricted in its applicability to the actual driver of a motor bus, but also applies to the owner of the bus or the person who has got the licence, and the fact that the person in whose name the licence had been obtained was not actually present in the bus when it was driven along a road prohibited for traffic by the licence is immaterial.

*N. S. Srinivasa Iyer* for Petitioner.

*P. Govinda Menon* for Crown Prosecutor.

N. S.

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*Devadoss, J.*

*14th October, 1927.*

Crl. Rev. Case No. 510 of 1927.

*Madras Local Boards Act, Ss. 222 and 223—Failure to take out licence—Prosecution for—Limitation for commencing.*

Where the accused was charged by a Taluk Board for failure to take out a potter's licence for the period commencing from the year 1924 and the complaint was filed in November 1926,

*Held*, that under S. 223 of the Madras Local Boards Act, the period of limitation was 3 months from the expiry of the year during which the licence, if granted, would have enured and consequently the complaint relating to the omission to take out the licence for the years 1924 and 1925 was barred.

*S. 223 and not S. 222 is applicable to cases of failure to get licence.*

*S. Soundararaja Aiyangar* for complainant and the *Public Prosecutor* for Crown.

N. S.

N R C

*Devadoss, J.*

*14th October, 1927.* } Crl. Rev. Case No. 527 of 1927.

*Criminal Procedure Code, S. 247—Summons case—Complainant absent—Son representing father dead and getting himself substituted—No further steps taken—Magistrate proceeding with the trial and convicting accused—Legality.*

Where in a summons case the complainant was absent on the day of the hearing and his son turned up and represented that his father was dead and that he be substituted in his place and the Taluk Magistrate gave him leave to do so but the complainant's son did not take any steps and the Magistrate proceeded with the trial of the case, examined witnesses and convicted the accused which conviction was upheld in appeal by the joint magistrates,

*Held* (in revision), that the conviction was bad as the Magistrate should have acquitted the accused under S. 247 of the Crl. P. Code.

19 C. W. N. 334, referred to.

*K. Kameswara Rao* and *K. Subbarama Iyer* for Petitioners.

*The Public Prosecutor* (*Mr. J. C. Adam*) for Crown

N. S.

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*Srinivasa Aiyangar and Reilly, JJ.*

*17th October, 1927.* } S. A. No. 903 of 1923.

*Court-fee—Ejectment suit against tenant—Defendant claiming value of improvements—Decree by first court for ejectment conditional on paying compensation—Appellate Court holding defendant to be licensee and directing ejectment without compensation—Second appeal by defendant—If Court-fee should be paid on amount of compensation claimed.*

Where a decree in ejectment was passed against a tenant conditional on paying him compensation in respect of the buildings erected by him and on appeal the Sub-Judge holding that the defendant was a mere licensee ordered ejectment without paying value of the improvements, and the defendant preferred a second appeal and paid Court-fees only on the valuation of the land without paying separate Court-fee on the compensation amount claimed,

*Held*, that the Court-fee paid was proper.

23 M. 84, 20 M. L. J. 121 and 45 M. 246, referred to.

The Malabar Tenants' Improvements Act does not apply to a mere licensee.

*B. Sitaram Rao* and *A. R. Sundara Iyer* for Appellant.

*K. P. M. Menon* and *P. Govinda Menon* for Respondent.

N. S.

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*Phillips and Ramesam, JJ.*

*18th October, 1927.* } A. S. No. 89 of 1925 & 288 of 1926.

*C. P. C., S. 92—Interest—Residents of the place—Feeding charity—Necessity to go and ask for food in the chatram.*

Residents of a place where a chatram in which feeding charity is being carried on, is situated have got sufficient interest to bring a suit under S. 92, C. P. C. It is not necessary that they should have had any necessity to go and ask for food in the chatram.

42 M. 360, dist.

*T. R. Ramachandra Iyer* and *S. R. Dikshit* for Appellant.

*K. V. Krishnaswami Iyer* and *K. G. Srinivasa Iyer* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*19th October, 1927.* C. M. S. A. No. 59 of 1927.

*Limitation Act, Art. 182—Execution sale of properties as belonging to the judgment-debtor—Delivery of possession to auction-purchaser—Subsequent dispossession by real owner—Suit by auction-purchaser against real owner—Dismissal of suit, Court holding properties did not belong to the judgment-debtor—Subsequent suit by auction-purchaser against decree-holder and judgment-debtor for refund of purchase-money—Decree given against decree-holder—Purchase-money collected in execution—Subsequent execution petition by decree-holder to execute his decree—Limitation.*

Certain properties were sold in execution of a decree as belonging to the judgment-debtor and purchased by a third person and were delivered to him. Subsequently the auction-purchaser was dispossessed by another person who claimed to be the real owner. The auction-purchaser filed a suit against him but the suit was dismissed on the ground that the properties did not belong to the judgment-debtor but belonged to the other person. Subsequently, the auction-purchaser filed a suit against the decree-holder and the judgment-debtor for refund of the purchase-money and a decree was passed against the decree-holder. In execution of this decree, the purchase-money was recovered by the auction-purchaser from the decree-holder. Then, the decree-holder filed a petition for executing his own decree. This petition was filed more than 3 years from the date of the decree obtained by the auction-purchaser against the decree-holder but within 3 years from the date of the refund of the purchase-money. It was also more than 12 years from the date of the original decree.

*Held*, (1) that the starting point of limitation for the Execution Petition was the date of the refund of the purchase-money by the decree-holder to the auction-purchaser and *not* the date of the decree obtained by the auction-purchaser for refund of the purchase-money;

30 M. 209, referred to ; and

(2) the present Execution Petition cannot be considered to be a continuation or revival of the old Execution Petition, inasmuch as the properties in respect of which a sale was asked for in the two petitions were entirely different.

*P. Somasundaram* for Appellant.

*C. Sambasiva Rao* for Respondent.

N. S.

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*Madhavan Nair and Reilly, JJ.* *19th October, 1927.* — Crl. App. No. 540 of 1927.

*Madras Local Boards Act, S. 3 (18)—Public road—Road poromboke beyond the limits of the road used by the public for passage.*

The words "public road" in S. 3 (18) of the Madras Local Boards Act includes the extent of the road *poromboke* between the limits of the metalled road used by the public for passage to and fro and the property of the adjoining owner.

*The Public Prosecutor* for Crown.

*T. S. Krishnaswami* (amicus curiæ) for A cused.

N. S.

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*Devadoss, J.* *19th October, 1927.* — C. R. P. No. 375 of 1926.

*Madras Estates Land Act, S. 192—C. P. Code, O. 21, Rr. 58 to 63—If apply to rent suits under the Act.*

The provisions of the C. P. Code relating to claim petitions, *viz.*, O. 21, Rr. 58 to 63 are applicable to rent suits under the Madras Estates Land Act.

*K. Kameswara Rao* for Petitioner.

*M. Venkatasubbiah* for *A. Krishnaswami Iyer*, for Respondent.

N. S.

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*Devadoss, J.* *19th October, 1927.* — C. R. P. No. 400 of 1926.

*Execution—Insolvency of decree-holder—Subsequent assignment of decree by decree-holder—Right of assignee to execute the decree—Right of Official Receiver to impeach the validity of the assignment.*

A decree-holder assigned the decree after he was adjudicated an insolvent. The assignee applied for recognition of the assignment and execution of the decree. Both the decree-holder and the judgment-debtor who were served with notice did not raise any objection but the Official Receiver raised the plea that the assignment was not valid.

*Held*, (1) that the Official Receiver had the *locus standi* to object to the assignment ; and

(2) that the assignment having been made by the decree-holder after the adjudication passed no interest to the assignee.

*N. Kunchithapatham* for Petitioner.

*A. C. Sampath Aiyangar* for Respondent.

N. S.

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*Devadoss, J.* *19th October, 1927.* — C. R. P. No. 148 of 1926.

*Religious Endowment Act (1925)—If retrospective.*

The provisions of the Religious Endowment Act of 1925 are not retrospective and the right of suit vested in persons prior to the passing of the Act is not affected.

*K. Krishnaswami Aiyangar* and *T. R. Arunachalam* for Petitioner.

*T. R. Ramachandra Iyer* and *D. V. Neelamegachariar* for Respondent.

N. S.

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*The Chief Justice and Anantha-krishna Aiyar, J.* *20th October, 1927.* — A. S. No. 227 of 1926.

*Limitation Act, Art. 118—Will authorising widow to adopt and directing all the properties except the house to be divided between the widow, daughters and adopted son in defined shares—Adoption by widow—Alienation by the adoptive mother and adopted son of the house—Suit by reversioner impeaching the alienation—Limitation.*

A testator authorised his widow to adopt and directed that all his properties except the house should be divided into shares and distributed to his widow, daughters and adopted son. The widow adopted a son. The adopted son and the adoptive mother alienated the house. Within 4 years from the date of the alienation but after 20 years from the date of the adoption the reversioner brought a suit impeaching the alienation.

*Held*, that the suit was barred by limitation under Art. 118 of the Limitation Act having been brought more than 6 years after the date of adoption, inasmuch as, the moment the adoption was made, it threatened the reversionary rights in view of the fact that the adopted son was given a share in the properties of the deceased.

36 I. C. 255, referred to.

*B. Satyanarayana* for Appellant.

*G. Lakshmanna* for Respondent.

N. S.

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*Srinivasa Iyengar, J.* *20th October, 1927.* — C. R. P. No. 818 of 1927.

*Practice—Appeal from order in insolvency—Necessity of notice to respondent before allowing appeal.*

Where a District Court allowed an appeal from an order of the Sub-Court dismissing an application by the insolvent for discharge as out of the time specified by the Court, without giving notice to the creditors or to the Official Receiver,

*Held*, that the procedure of the District Court was irregular, as no Court has any right to allow an appeal without giving notice to the parties affected by the same.

*E. Krishna Iyer* for Petitioner.

*V. Sambandam Chetty* for Respondent.

N. S.

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*Madhavan Nair and Reilly, JJ.* *20th October, 1927.* — Crl. Rev. Case No. 559 of 1927.

*Indian Penal Code, Ss. 467 and 471—Suit in which forged document put forward—Persons not parties—Complaint for*

*offence of fabrication of document against—Power of Court to lodge.*

A Court has got power to prefer a complaint in respect of offences alleged to have been committed before it against persons who are not parties to the suit. So far as the parties to the suit are concerned, the Court must be taken to have acted as a Court in preferring the complaint. So far as the persons not parties to the suit are concerned, the Court must be taken to have acted as a public servant lodging a complaint and it is not necessary that such a complainant should have been examined on oath.

*C. Sidney Smith* for Accused.

*The Public Prosecutor* for Crown.

N. S.

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*Philips and Ramesam, JJ.* *20th October*, 1927. — A. S. No. 342 of 1926.

*Civil Procedure Code, S. 92—Scheme decree—Modification—If can be made by an application.*

Where a decree has been made settling a scheme in a suit under S. 92, C P.C., any modification of it can be made only by a fresh suit and not by any application in the same suit.

*B. Somayya* for Appellant.

*K. Krishnasami Iyengar, V. C. Veeraraghavan* and *T. K. Srinivasathathachariar* for Respondent.

N. S.

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*Srinivasa Aiyangar, J.* *20th October*, 1927. — C. R. P. No. 785 of 1927.

*Civil Procedure Code, O. 33, R. 1 and O. 22, R. 3—Application to sue* in forma pauperis*—Death of applicant—Right of legal representative to continue the application.*

An application to sue *in forma pauperis* cannot be continued by the legal representative of the applicant after the death of the applicant, as the right is a personal one. But the legal representative may undertake to pay the proper court-fees and continue the suit in which case the date of the filing of the application will be deemed to be the date on which the plaint was presented.

*P. Panini Rao* for Petitioner.

N. S.

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*Madhavan Nair and Jackson, JJ.* *20th October*, 1927. — C. M. A. No. 377 of 1926.

*Provincial Insolvency Act (V of 1920), S. 17—Debtor's petition—Death of the debtor before adjudication—Jurisdiction of Court to adjudicate.*

The Insolvency Court has got power to adjudicate a person as insolvent on his petition, even though the petitioner died subsequent to the filing of the petition.

*N. Kunchithapatham Iyer* for Appellant.

*R. Krishnaswami Aiyangar* for Respondent.

N. S.

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*Devadoss, J.*
*19th October, 1927.*

C. R. P. No. 1234 of 1926.

*Madras Estates Land Act, Ss. 74 and 75 (7)—Application for appraisement of rent—Award of Revenue Inspector—Order of confirmation by Sub-Collector—Appeal to District Collector—If lies—Revision—Appeal to District Court.*

No appeal lies to the District Collector against an order of the Sub-Collector confirming an award of the Revenue Inspector in an application for appraisement of rent under S. 74 of the Madras Estates Land Act.

*Quære* :—Whether an appeal does not lie to the District Court against an order of the Sub-Collector confirming the award, as the said order tantamounts to a decree for arrears of rent under S. 75, cl. 7 of the Estates Land Act ?

*A. Ramaswami Ayyangar* for Petitioner.

*S. Nagaraja Ayyar* for Respondents.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*20th October, 1927.*

C. M. A. No. 248 of 1925.

*Religious Endowment—Dedication to trust—Deed not providing for devolution of trustees after the death of the founder—Effect—Right to nominate trustees—In whom vests—Power given jointly to two persons—Death of one—Other when entitled to exercise.*

Where by a deed certain properties were dedicated to charities for the worship of an idol by two brothers and it was provided that one of the brothers must be in management and possession of the properties but there was no provision as to the devolution or mode of appointment of trustees after the death of the founders.

*Held*, that, on the death of the brother who managed the properties, the other brother alone was not entitled to appoint or nominate a trustee but the right of nomination devolved upon both the surviving brother and the heirs of the other deceased brother who were the founders of the trust.

*S. T. Srinivasagopalachari* for Appellant.

*B. Sitarama Rao* for Respondents.

N. S.

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*Srinivasa Aiyangar and Jackson, JJ.*
*21st October, 1927.*

S. A. Nos. 29 and 30 of 1925.

*Madras Hereditary Village Offices Act, S. 6—Construction of—Right of members of family to insist upon selection being made from a particular group of persons—Suit in Civil Court—Maintainability.*

In cases where new village officers are created by virtue of regrouping, amalgamation or division of villages, S. 6 of the Madras Hereditary

Village Offices Act no doubt casts an obligation upon the Revenue authorities to make a selection from the members of the families of the last holders of the offices which have been abolished. But it does not confer any right on the members of the families to insist upon such a selection and a suit by a member of the family for a declaration that the defendant was not properly appointed in accordance with the terms of the section is not maintainable.

*T. R. Ramachandra Ayyar* for Appellant.

*P. Venkataramana Rao* for Government.

*M. Krishna Bharathi* for Respondent.

N. S.

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*Devadass, J.*
*25th October*, 1927. } C. R. P. No. 413 of 1926.

*Civil Procedure Code, Sch. II, para. 15—Legal misconduct—Arbitrator deciding on local inspection but not on evidence.*

Failure to take evidence by an arbitrator, while the terms of reference to him do not specifically empower him to dispense with it, amounts to legal misconduct, and the award based merely upon local inspection cannot stand.

*K. S. Ramabhadra Ayyar* for Petitioner.

*T. R. Srinivasan* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*26th October*, 1927. } C. M. P. No. 3590 of 1927.

*Letters Patent (Amended), cl. 15—Order on application for stay of execution pending civil revision petition—If appealable.*

No appeal lies from an order passed on an application for stay of execution pending civil revision petion.

*P. G. Krishna Ayyar* for Petitioner.

*K. Ramachandra Ayyar* for Respondent.

N. S.

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*Waller and Madhavan Nair, JJ.*
*28th October*, 1927. } C. M. P. No. 49 of 1927.

*Civil Procedure Code, S. 110—Substantial question of law—Point concluded by the Full Bench decision of the High Court—Different view of the other High Courts—Valuation of subject-matter of suit—Mesne profits subsequent to date of suit—If can be taken into account.*

The question of the maintainability without the sanction under S. 92, C. P. C., of a suit between two persons each claiming to be the lawful trustee of a religious endowment is not a "substantial question of law" for purposes of leave to appeal to His Majesty in Council under S. 110, C. P. C., concluded as it is by a Full Bench decision of the High Court reported in I. L. R. 45 Mad. 113, whatever the view of the other High Courts on the point may be.

*Quære*:—Whether mesne profits subsequent to the date of the suit for recovery of possession can be taken into account in valuing the subject-matter of the suit in the Court of first instance under S. 110, C. P. Code.

43 M. L. J. 622 and 39 Mad. 843 referred to.

*P. Satyanarayana Rao* for Petitioner.

*Ch. Raghava Rao* for Respondents.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*28th October, 1927.*

C. M. A. No. 444 of 1926.

*Provincial Insolvency Act, S. 7—Swasthiwachakam service inam land—Rents and profits from—Power of Court to make an order vesting them in the Official Receiver.*

Though a Swasthiwachakam service inam land is not attachable in execution of a decree, it does not follow that the rents and profits accruing thereon are not liable for attachment, and there is nothing to prevent a Court from realising the rents and profits from the lands for any particular year by the appointment of a receiver and, after paying enough out of them to the Inamdar for his subsistence, from appropriating the balance towards the satisfaction of the decree.

45 Mad. 620 (F.B.) referred to.

49 M. L. J. 244 (P.C.) followed.

It is therefore competent to an Insolvency Court under the Provincial Insolvency Act by adopting the same course to vest the balance of rents and profits accruing due, in the hands of the Official Receiver for the benefit of the creditors, after making the necessary allowance for the Inamdar.

*K. Subba Rao* for the *Hon'ble Mr. V. Ramadoss* for Appellant.

*Ch. Raghava Rao* and *S. Ramachandran* for Respondents.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*1st November, 1927.*

C. M. A. No. 195 of 1927.

*Provincial Insolvency Act, S. 43—If mandatory or directory—Court's power to extend time originally fixed for applying for discharge.*

The provisions of S. 43 of the Provincial Insolvency Act are mandatory, and not merely directory, and it is not open to the Insolvency Court to extend the time for an insolvent to apply for discharge after the expiration of the time originally fixed.

4 Pat. 51 and Wallace, J.'s view in 19 L. W. 418 followed.

Krishnan, J.'s view in 19 L. W. 418 dissented from.

51 M. L. J. 209, 51 M. L. J. 60 and 51 Cal. 337 referred to.

*Ch. Raghava Rao* for Appellant.

*A. V. Krishna Rao* for Respondent.

N. S.

*Kumaraswami Sastri and Wallace, JJ.*
*3rd November, 1927.*

C. M. A. No. 362 of 1926.

*Civil Procedure Code, O. 43, R. 1 (w) and O. 47, Rr. 1 and 7—Order granting review—Appeal—When maintainable—Review on the ground that a ruling was not cited at the original hearing—If can be granted—"Error apparent on the face of the record"—Meaning of.*

No appeal lies against an order granting review on the ground that a certain ruling of a High Court was not cited on the previous occasion.

Case-law reviewed.

A legal doctrine of a High Court is " new and important matter " within the meaning of O. 47, R. 1, C. P. Code.

The " error apparent on the face of the record " in O. 47, R. 1 must be an error apparent on a perusal of the judgment itself and not by reference to extraneous matters.

Case-law reviewed.

*K. Bhashyam Ayyangar* and *T. R. Srinivasan* for Appellant.

*A. Ramaswami Ayyangar* for Respondent.

N. S.

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*Devadoss, J.*
*26th October, 1927.*

C. R. P. No. 630 of 1926.

*Madras Local Boards Act, Ss. 93 and 228—Professional income—Gross income or net income—Suit for recovery of excess professional tax collected on the ground that the tax was levied on the gross income—Jurisdiction of civil court.*

The words " professional income " in section 93 of the Madras Local Boards Act mean the net income and not the gross income. 27 M. 547 referred to.

A suit for recovery of excess professional tax collected by the Union Board under the Madras Local Boards Act, on the ground that the tax was improperly levied on the gross income instead of the net income, is maintainable in the civil court, as the dispute relates to the basis of the assessment and not to the quantum of the assessment.

*C. A. Seshagiri Sastri* for Petitioner.

*T. M. Krishnasami Ayyar* for Respondent.

N. S.

*Srinivasa Aiyangar and Jackson, JJ.*
*26th October, 1927.* } S A. No. 620 of 1926.

*Hindu Law—Joint family—Alienation by manager—Substantial portion of consideration not for legal necessity—Form of decree—Alienation if should be set aside.*

It is not an inflexible rule of law that, when a substantial portion of consideration in the case of an alienation by the manager of a joint Hindu family is not supported by legal necessity, the alienation should be set aside in its entirety. It is in the discretion of the Court to set aside the alienation or not. Where it was found that an alienation of about 6 and odd acres of land was made for Rs. 900 and odd, out of which, Rs. 400 and odd was for necessity, and that the properties comprised in the alienation were capable of division,

*Held*, that the entire alienation should not be set aside but should be upheld in respect of one-half of the properties.

16 L. W. 595 referred to.

*N. Swaminatha Aiyar* for Appellant.

*V. Suryanarayana* for Respondent.

N. S.

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*Devadoss, J.*
*26th October, 1927.* } C. R. P. No. 70 of 1926.

*Madras District Municipalites Act, S. 354—Enhancement of tax without notice—Suit for refund—Jurisdiction of Civil Court.*

A suit in the Civil Court for refund of enhanced tax on the ground that the enhancement was made without notice is maintainable. The Civil Court has jurisdiction in cases where the provisions of the Act are not substantially complied with.

*K. S. Desikan* for Petitioner.

*Sundaralingam* for Respondent.

N. S.

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*Srinivasa Aiyangar and Jackson, JJ.*
*28th October, 1927.* } S. A. No. 1322 of 1924.

*Partnership—Working partner—Right to settle debt due to the partnership.*

A working partner is entitled to settle a debt due to the partnership and such a settlement is binding on the partnership.

*C. S. Venkatachariar* for Appellant.

*K. Varadachari* for Respondent.

N. S.

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*Devadoss, J.*
*28th October, 1927.* } Cr. R.C. Nos. 402 and 403 of 1927.

*Madras Local Boards Act, S. 221—Prosecution for non-payment of profession tax—Power of magistrate to go into the basis of the assessment or the quantum of it—Magistrate acting under—If a Criminal Court—Criminal Procedure Code, S. 435.*

N. R. C

A magistrate before whom a prosecution is launched for non-payment of the profession tax under S. 221 of the Madras Local Boards Act has no power to go into the basis of the assessment of the tax or the quantum of it. A magistrate acting under S. 221 and reducing the tax levied by the Taluk Board acts as a Criminal Court and his order can be revised by the District Magistrate under S. 435 of the Criminal Procedure Code.

*N. S. Srinivasa Aiyar* for Complainant.

*The Public Prosecutor* for the Crown.

*R. Visvanatha Aiyar* for Accused.

N. S.

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*Devadoss, J.*
*31st October, 1927.* } C. R. P. No. 1105 of 1926.

*Practice—Defendant declared* ex parte*—Suit pending—Right to appear at a later stage.*

In a pending suit a defendant, who was declared *ex parte* at a hearing, is not precluded from appearing at a later stage of the suit and continue it.

*K. S. Desikan* for Petitioner.

*M. Patanjali Sastri* for Respondent.

N. S.

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*Devadoss, J.*
*31st October, 1927.* } C. R. P. Nos. 245 to 247 of 1927.

*Civil Procedure Code, S. 47 and O. 21, R. 90—Application to set aside sale in execution of rent decree—Appeal.*

An order on an application to set aside a sale held in execution of a decree passed by a Revenue Court on grounds not covered by O. 21, R. 90 of the C. P. C. is appealable under S. 47, C. P C., as the section is not made inapplicable by S. 192 of the M. E. L. Act.

*E. Vinayaka Row* for Petitioner.

*M. S. Venkatarama Aiyar* and *S. Ranganswami* for Respondent.

N. S.

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*Jackson and Anantha-krishna Aiyar, JJ.*
*31st October, 1927.* } S. A. No. 915 of 1926.

*Contract Act, S. 70—Irrigation tank supplying water to the lands of the plaintiff and defendants—Repairs effected by the plaintiff—Defendants benefited by the repairs—Right of plaintiff to contribution in respect of the expenses of repairs.*

An irrigation tank which supplied water to the lands belonging to the plaintiff and the defendants was owned by the plaintiff. It breached in one year with the result that wet cultivation could not be carried on. The plaintiff spent money and closed up the breaches and the result of it was that the lands of the plaintiff and the defendants could be cultivated with wet crops as before the breaches. The plaintiff sued to recover half the amount of the expenses by way of contribution.

*Held*, that, as the tank belonged to the plaintiff and as the plaintiff denied the right of the defendants to enter upon the tank, it cannot be said that the plaintiff did the repairs "*for the defendant*" within the meaning of S. 70 of the Contract Act and that therefore the plaintiff was not entitled to contribution.

Per *Ananthakrishna Aiyar, J.*—To constitute an act as having been done *for* another, there must be a legal duty to do that act on the part of the other which the law could compel him to perform. No right to contribution arises unless there is such legal duty.

*A. Krishnaswami Aiyar* for Appellant.

*S. T. Srinivasagopalachari* for Respondent.

N. S.

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*Srinivasa Aiyangar and Ananthakrishna Aiyar, JJ.*
*1st November*, 1927. } S. A. Nos. 329 and 330 of 1926.

*Indian Companies Act, S. 38—Purchaser of shares in limited Company in Court auction—Suit by purchaser to direct the Company to register the shares in his name—Maintainability—Right to have his name registered.*

In execution of a decree the shares in a company standing in the name of the judgment-debtors' father were sold in Court auction. The auciton-purchaser applied to the company to register the shares in his name. The company pleaded that the only person whose title they were bound to recognise was the executor or administrator of the deceased under the Articles of Association and further that they had a discretion in the matter.

*Held* (1) that the application contemplated by S. 38 of the Companies Act was not the only remedy and did not exclude the ordinary right of suit of a party; and that therefore the suit was maintainable, and (2) that the Company was bound to register the names of the auction-purchaser as owner of the shares and could not arbitrarily refuse to do so.

4 Ch. App. 20 referred to.

*S. Varadachariar* and *S. T. Srinivasagopalachariar* for Appellant.

*A. Krishnaswami Aiyar* and *T. M. Ramaswami Aiyar* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*1st November*, 1927. } C. R. P. No. 1113 of 1925.

*Civil Procedure Code, S. 2 (20)—Civil Rules of Practice, Rr. 2 (11) and 81—"Signed"—Meaning of—Affixture of facsimile by a party capable of writing his signature in vakalats and affidavits.*

The word "signed" in R. 81 of the Civil Rules of Practice includes stamping or affixing of facsimile and consequently a vakala

or affidavit containing the facsimile of a party who is capable of writing his signature is not invalid.

3 A. 575 followed.

*S. Sundararaju Aiyangar* for Petitioner.

Respondent unrepresented.

N. S.

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*Phillips and Srinivasa Aiyangar, JJ.*
*3rd November*, 1927.

C. M. A. No. 197 of 1927.

*Civil Procedure Code, S. 47 and O. 21, R. 66—Settling the terms of sale proclamation—Court if bound to decide the question of market value—Order under—Appeal—Notice—Non-service of—Effect.*

In execution of a mortgage decree the properties were brought to sale. The lower Court, without itself finding what the market value of the properties was, directed that the values of the properties given by the decree-holder, the judgment-debtor, and the Commissioner who was appointed to report about the value, be all given in the sale proclamation and sale conducted. Against this order an appeal was preferred by the judgment-debtor.

*Held* (1) that there was no duty upon the Court to decide what exactly the market value of the properties was and insert it in the proclamation and consequently the order which directed the insertion of the three values given by the decree-holder, the judgment-debtor and the Commissioner without giving its own value was not illegal.

C. M. A. No. 345 of 1926 followed.

20 A. 412 (P. C.) distinguished.

(2) that the question was not one relating to the execution, discharge or satisfaction of the decree under S. 47, C P. C., and that therefore no appeal lay.

(3) that the fact that the proclamation was settled without notice to the judgment-debtor was immaterial as notice was originally given to the judgment-debtor and he was *ex parte* then.

*K. S. Krishnaswami Aiyangar* and *V. N. Venkatavaradachari* for Appellant.

*K. V. Krishnaswami Aiyar* and *A. V. Visvanatha Sastri* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.* 
*4th November*, 1927. — C. R. P. No. 546 of 1925.

*Civil Procedure Code, O. 17, Rr. 2 and 3—Party and vakil present—Adjournment refused—Vakil declining to proceed with the suit—Dismissal of suit—If fills under R. 2 or R. 3.*

Where, on a date to which a suit had been adjourned for evidence, both the party and his vakil were present and the vakil applied for adjournment and, on the adjournment being refused, did *not* report no instructions but merely declined to proceed with the suit and the suit was dismissed.

*Held*, that the dismissal should be taken to have been one for default and an application for restoration would lie.

*T. M. Krishnaswami Ayyar* and *K. S. Desikan* for Petitioner.

*The Government Pleader* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.* 
*4th November*, 1927. — C. R. P. No. 852 of 1926.

*Civil Procedure Code, S. 115—Order directing payment of deficient Court-fee—Revision.*

An order directing the payment of deficient Court-fee in a suit i revisable by the High Court.

48 M. L. J. 688 and 36 I. C. 831 followed.

50 M. L. J. 497 and 102 I. C. 877 not followed.

*T. L. Venkatarama Ayyar* for Petitioner.

*S. T. Srinivasagopalachari* for Respondent.

N. S.

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*Devadoss, J.* 
7th *November*, 1927. — C. R. P. Nos. 1517 to 1519 of 1927.

*Consolidation—Jurisdiction of High Court to consolidate Civil Revision Petitions—Effect on process fees.*

The High Court has got jurisdiction to consolidate Appeals and Civil Revision Petitions relating to the same subject-matter.

The effect of consolidation is to treat all the cases as a single one and consequently the process fee must be calculated on the basis of a single case instead of a batch of several cases.

26 C. 214 distinguished.

*T. M. Krishnaswami Ayyar* for Petitioner.

*T. A. Anantha Ayyar* (*amicus curiae*) for the Office.

*The Government Pleader* for the Government.

N. S.

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*Ramesam and Jackson, JJ.* 
*7th November*, 1927. — C. R. P. No. 1284 of 1925.

*Indian Contract Act, S. 61—Two debts, one for credit and another for cash, contracted on the same day—Mode of appropriation.*

N. R. C.

When two debts, one for cash and another for credit, are contracted on the same day, and subsequently payment is made by the debtor and neither party made any appropriation.

*Held*, that the debt for cash was the earliest as it became due earlier than the other and it should be discharged first, and the debts are not of equal standing simply because they were contracted on the same date.

*V. Rajagopala Ayyar* for Petitioner.

*K. Narasimha Ayyar* for Respondent.

N. S.

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*Kumaraswami Sastri and Wallace, JJ.*
*7th November, 1927.* C. R. P. No. 1216 of 1925.

*Civil Procedure Code, O. 22, Rr. 3, 4 and 10—Mortgage suit—Death of decree-holder after preliminary and before final decree—Legal representatives not coming on record in time—Abatement.*

In a mortgage suit the mortgagee decree-holder died after the date of the preliminary decree but before the period fixed for payment had expired. Nearly three years thereafter certain persons claiming to be the legatees under a will left by the deceased applied to be added as his legal representatives. The question arose whether the suit had abated in the meanwhile. Their Lordships referred the following question for the decision of a Full Bench: " Whether O. 22, Rr. 3 and 4 of the C. P. C. apply to the case of death of a party after the passing of a preliminary decree in the suit.

*B. V. Viswanatha Ayyar* for *N. Swaminathan* for Petitioner.

*C. S. Venkatachariar* for *P. N. Appuswami* for Respondents.

N. S.

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*Wallace and Srinivasa Ayyangar, JJ.*
*8th November, 1927.* S. A. No. 236 of 1925.

*Hindu Law—Marriage—Approved or unapproved form—Payment of* parisam.

Where a sum of 5 pagodas was paid as *parisam* to the father of the bride and a sum of Rs. 40 was paid in addition for marriage expenses, the marriage is in an unapproved form and not an approved form.

32 M. 512, 13 L. W. 582 and 49 M. L. J. 554 referred to.

*T. M. Krishnaswami Ayyar* for Appellant.

*A. Sundaram* for Respondent.

N. S.

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*The Chief Justice and Ananthakrishna Ayyar, J.*
*9th November, 1927.* C. C. C. A. No. 19 of 1926.

*Deed—Construction—License or lease—Contract—Party in default—Right to damages.*

Where a document does not give exclusive possession of the property comprised in it but merely marks the trees in the property for tapping, and also provides expressly that the executant or his agents

should not be prevented from entering into the property, it does not amount to a lease.

48 M. 368 F. B. referred to.

In the case of a contract, the party who has himself committed default is not entitled to recover damages from the other.

*T. S. Rajagopala Ayyar* for Appellant.

*G. Ramakrishna Ayyar* for Respondent.

N. S.

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*Devadoss, J.*
*9th November*, 1927. } C. R. P. No. 542 of 1926.

*Madras District Municipalities Act, S. 354 and Sch. V (2)—Machinery—Handlooms—Jurisdiction of Civil Court to interfere with assessment under the Act.*

Handlooms and similar industrial implements are not "machinery" within the meaning of Sch. V (2) of the Madras District Municipalities Act.

Where license fee was levied by the Municipal Council in respect of handlooms, the Civil Court has jurisdiction to entertain a suit for the recovery of the license fee paid.

*N. Govindan* for Petitioner.

*M. C. Stridharan* for Respondent.

N. S.

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*Ramesam and Jackson, JJ.*
*9th November*, 1927. } C. M. S. A. No. 122 of 1926. and C. R. P. No. 417 of 1927.

*Civil Procedure Code, S. 145 and O. 21, R. 43—Bond for production of goods attached before judgment—Subsequent attachment and sale in another suit—Non-production of goods by the surety—Forfeiture—If illegal.*

A surety for the production of goods attached before judgment in one suit cannot be proceeded against in execution of a decree in another suit. The forfeiture of the bond for non-production of goods by the surety in a subsequent suit is illegal.

*K. S. Ramabhadra Ayyar* for the Appellant.

*V. Rajagopala Ayyar* for the Respondent.

N. S.

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*The Chief Justice and*
*Ananthakrishna Ayyar, J.*
*10th November*, 1927. } C. C. C. A. No. 38 of 1926.

*City Municipal Act of 1919, S. 100—Lease by owner—Substantial constructions by the lessee—Owner if liable to pay property-tax in respect of the constructions.*

Where the owner leased the properties and the lease-deed provided that the lessee can make constructions upon the property leased but the lessee would not be entitled to remove anything permanently attached to the ground, and the lessee erected substantial buildings on the property.

*Held*, that the lessor was the " owner " of the substantial structures erected by the lessee within the meaning of S. 100 of the City Municipal Act and as such liable to the property-tax.

*K. S. Krishnaswami Ayyangar* for Appellant.

S. *Rangaswami Ayyangar* for Corporation and *T. G. Raghavachari* for Landlord.

N. S.

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*Devadoss, J.*

*10th November*, 1927.

Crl. Rev. C. No. 490 of 1927.

*Madras District Municipalities Act, Ss. 195, 204 and 321 (7)—License for construction of pandal—Period fixed in license—Pandal kept on, without renewing license, after the expiration of the period—Licensee if liable to conviction.*

A person was granted a license for a fixed period to erect a pandal with inflammable materials by the Municipality. He erected the pandal and kept it on after the expiry of the period without getting the license renewed.

*Held*, that S 195 of the District Municipalities Act applied only to the case of constructing or re-constructing a pandal and there was no provision in the Act which compelled a person to take out a license for keeping a pandal already erected in pursuance of a license.

*C. Narasmihachari* and *M. B. Rajagopalachari* for Petitioner.

*R. N. Aingar* and *T. S. Krishnaswami* for Respondent.

N. S.

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*Wallace and Srinivasa Ayyangar, JJ.*

*10th November*, 1927.

S. A. No. 129 of 1925.

*Hindu Law—Partition—Relinquishment of right to partition—Written instrument if necessary.*

Partition does not amount to conveyance and therefore does not require a written instrument for its validity. Similarly, the relinquishment of right to partition can be done orally and no written instrument is necessary for its validity.

*S. Muthia Mudaliar* for Appellant.

*T. M. Krishnaswami Ayyar* for Respondent.

N. S.

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*Beasley, J.*
*27th October, 1927.* } C. S. No. 425 of 1925.

*Transfer of Property Act, S. 6—Portion of debt to come into existence in future—If can be assigned.*

There cannot be a valid assignment of a debt unless it is payable in present, contingent or in future ; a debt which is to come into existence in future cannot be validly assigned.

The assignment of a portion of a debt is not valid in law.

*M. S. Venkatrama Aiyar* for Plaintiff.

*K. S. Krishnaswami Aiyangar* for Defendant.

N. S.

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*Beasley, J.*
*14th November, 1927.* } C. S. No. 257 of 1926.

*Madras District Municipalities Act, Ss. 92 and 350—Company employing agent at a place for the purpose of purchase of goods —Purchase concluded at another place—Effect—Payment of tax under protest—Suit for refund—Maintainability.*

The Bombay Company which was situated at Madras employed an agent at Dindigul whose business was to purchase produce for the Company under their instructions. The Company were also the managing agents of the Tinnevelly Cotton Press Co. which had ginning plant in Dindigul and in respect of this the Bombay Company were entitled to certain profits which were received in Madras. The establishment and other charges at Dindigul were first paid by the Bombay Co. and then debited against the Tinnevelly Cotton Press Co. The Municipality of Dindigul levied Company tax on the Bombay Co. The Company paid it under protest and brought a suit for refund of the amount.

*Held*, that the Company cannot be said to carry on business in Dindigul, as it merely employed the agent for the purpose of purchases of goods which were concluded only in Madras and as all the profit earning transactions in respect of the Tinnevelly Cotton Press Co. were concluded only in Madras.

1896 A. C. 325 referred to.

*Held also*, that the suit was not barred by S. 350 of the Act, as it cannot be said that the Municipality complied with the provisions of the Act in substance and in effect.

*Vere Mockett* for Plaintiff.

*R. Sethurama Sastri* and *P. Veeraraghavan* for Defendant.

N. S.

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*Phillips and Madhavan Nair, JJ.*
*15th November, 1927.* } Cr. R. C. No. 1014 of 1927.

*Criminal Procedure Code, S. 202—Enquiry under—Issue of notice to the accused—When justifiable.*

The practice of magistrates issuing notices to the accused persons in the course of enquiries under S. 202, Crl. P. C., is unwarranted by the

provisions of the Code and an accused person ought not to be compelled to attend the court until a *prima facie* case is made out against him.

49 Mad. 918 : 51 M. L. J. 605 (F. B.) followed.

*K. S. Jayarama Aiyar* and *V. Pattabhirama Sastri* for accused.

*V. L. Ethiraj* for Complainant.

*The Public Prosecutor* for the Crown.

N. S.

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*Ananthakrishna Ayyar, J.*
*15th November, 1927.* } C. R. P. No. 980 of 1926.

*Civil Procedure Code, O. 22—Suit against dead person—Legal representative, if can be impleaded.*

A suit against a dead man is no suit at all and consequently his legal representatives cannot be brought on record in that suit.

49 M. L. J. 590 dist.

*A. Ganesa Aiyar* for Petitioner.

*S. Panchapagesa Sastri* for Respondent.

N. S.

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*Madhavan Nair, J.*
*15th November, 1927.* } C. R. P. No. 1132 of 1926.

*Pleader—Right to sue for commission fees.*

A suit by a vakil, who was appointed a commissioner in a suit to value improvements, to recover commission fees is maintainable, if there was an express or implied agreement to pay the same.

10 M. L. J. 241 followed.

*N. R. Sesha Aiyar* for Petitioner,

*K. P. Ramakrishna Aiyar* for Respondent.

N. S.

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*Kumaraswami Sastri and Devadoss, JJ.*
*16th November, 1927.* } S. A. No. 298 of 1925.

*Civil Procedure Code, O. 21, Rr. 58 to 63—Rent decree—Attachment—Mortgage claim by plaintiff—Mortgage not denied by decree-holder but only priority disputed—Claim dismissed as too late—Suit on mortgage by plaintiff more than one year after the date of the claim order.*

The defendant attached the properties in execution of a rent decree passed under the Madras Estates Land Act. The plaintiff who had a mortgage on the properties put in a claim petition. The defendant did not dispute the mortgage but only contested the right of priority of the plaintiff's mortgage over the charge for arrears of rent due to him from the mortgagor for which the decree was passed. The claim petition was dismissed as being too late.

*Held*, that though no attachment was in law necessary to bring the properties to sale in execution of the rent decree, still, as attachment was actually made and a claim petition was put in, the order on the claim petition was conclusive as to the rights put forward therein

unless a suit was instituted within one year to set aside the order, but, as in this case, the plaintiff's mortgage was not denied but only his right of priority contested, the effect of the order was not to wipe off the mortgage in favour of the plaintiff but only to postpone it to the charge for rent in defendant's favour.

17 M. 17 and 45 M. 90 referred to.

*V. Govindarajachari* for Appellant.

*B. Satyanarayana* for Respondent.

N. S.

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*Phillips and Ramesam, JJ.*
*16th November, 1927.* } C. R. P. No. 607 of 1927.

*Limitation Act, Art. 174—"Duly served"—Substituted service—Effect—Civil Procedure Code, O. 5, R. 20.*

Substituted service, properly effected, is as effectual as if it has been made on the defendant personally and consequently limitation for an application to set aside the exparte decree where the defendant was served by substituted service commences from the date of such service.

52 M. L. J. 477 and 52 M. L. J. 512 followed.

Recent Judgment of Srinivasa Aiyangar, J., to the contrary in C. R. P. No. 375 of 1927 (not yet reported) not followed.

*N. S. Srinivasa Aiyar* for *T. L. Venkatarama Aiyar* for Petitioner.

*K. G. Srinivasa Aiyar* for Respondent.

N. S.

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*Kumaraswami Sastri and Devadoss, JJ.*
*16th November, 1927.* } C. M. P. Nos. 4249 and 4250 of 1926.

*Civil Procedure Code, S. 92—Appeal against scheme decree—Appellants fraudulently withdrawing appeal—Right of other worshippers to continue appeal or file fresh appeal—Limitation Act, S. 5—Excusing delay.*

Where in a suit under S. 92, C. P. C., the plaintiffs preferred an appeal against the scheme decree passed by the trial court but subsequently withdrew the appeal with a dishonest motive, and certain other worshippers applied to the High Court to be added as parties to the original appeal and in the alternative for the admission of a fresh appeal preferred by them, at the same time excusing the delay in filing the fresh appeal.

*Held*, (1) that the scheme suit being a representative suit the worshippers were constructively parties to the appeal and that they could be added as parties to the original appeal without any question of limitation or excusing delay being gone into ;

(2) that assuming it was a fresh appeal filed out of time it was a proper case for excusing the delay.

31 M. 236 : 18 M. L. J. 387 (P.C.) relied on.

*K. V. Krishnaswami Aiyar, K. S. Sankara Aiyar* and *B. V. Viswanatha Aiyar* for Petitioners.

*T. R. Ramachandra Aiyar, P. R. Ganapathi Aiyar* and *V. Ganapathi* for Respondents.

N. S.

*Waller, J.*

*16th November*, 1927.

In the matter of Pachayappah's Charties.

*Civil Procedure Code, S. 92—Application to direct the trustees of an educational institution to admit the depressed classes into the institution—Maintainability—Depressed classes, whether Hindus.*

An application to Court to direct the trustees of an educational institutiou to admit the depressed classes into the institution is not maintainable, as such a direction is one for the proper administration of the trust falling within S. 92 (*h*), C. P. C., and can only be obtained in a properly framed suit as contemplated by S. 92.

3 R. 582 referred to.

The general relief in cl. (*h*) of S. 92 is not *ejusdem generis* with the reliefs mentioned in clauses (*a*) to (*g*).

*P. Venkatramana Rao* for the Appellant.

*B. Satyanarayana* for Trustees,

N. S.

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*Phillips and Madhavan Nair, JJ.*

*18th November*, 1927.

C. M. A. No. 406 of 1926.

*Civil Procedure Code, S. 11—Execution proceedings—Third person intervening with title before sale proclamation—Court proceeding with sale without deciding question of title—Right of the third person to prefer claim when he is sought to be dispossessed by the purchaser in the sale.*

Before the properties were brought to sale in execution of a decree, a third person intervened on the ground that the properties belonged to him. But the Court without deciding the question of title proceeded with the sale. Subsequently when the purchaser in the sale went to take delivery of possession, the same person obstructed. The decree-holder purchaser contended that the obstructor was precluded from raising the question by a prior order.

*Held*, that there was no adjudication as to title and consequently the objector was not precluded from raising the question at a later stage.

18 L. W. 752 referred to. 49 M. L. J. 401 distinguished.

*K. S. Venkatarama Aiyar* for the Appellant.

*P. J. Kuppanna Rao* for the Respondent.

N. S.

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*Wallace and Srinivasa Ayyangar, JJ.*
*18th November*, 1927.
S. A. No. 442 of 1925.

*Madras Estates Land Act, S. 195—Notice of attachment of holding by landlord—Suit by tenant objecting to the attachment on the ground that arrears of rent claimed were excessive—Admitted amount not paid into court—Effect.*

A landlord took proceedings for recovery of arrears of rent by attachment and sale of the holding of the ryot. The ryot instituted a suit under S. 112 of the Madras Estates Land Act contesting the attachment on the ground that the amount of arrears stated was excessive and that only a smaller amount was due.

*Held*, that S. 195 of the Act barred the hearing of the suit unless the tenant paid the admitted amount into Court.

*N. Sivaramakrishna Aiyar* for Appellant.

Respondent unrepresented.

N. S.

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*Wallace and Srinivasa Ayyangar, JJ.*
*21st November*, 1927.
S. A. No. 58 of 1925.

*Injunction — Wrongful obtaining of order of—Suit for damages—When maintainable.*

A suit for damages for the wrongful obtaining of an order of injunction does not lie unless it is shown that the order was obtained maliciously or without reasonable or probable cause.

35 M. 598 : 21 M. L. J. 1052 followed.

31 C. L. J. 495 not followed.

*T. L. Venkatrama Aiyar* for Appellant.

*A. V. Narayanaswami Aiyar* for Respondent.

N. S.

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*Devadoss, J.*
*21st November*, 1927.
C. R. P. No. 363 of 1927.

*Criminal Procedure Code, S. 476—Court acting under—Power to take additional evidence in appeal.*

A Court of appeal acting under S. 476 of the Crl. P. Code has no power to take additional evidence.

*K. S. Jayarama Aiyar* for Petitioner.

*M. Patanjali Sastri* for Respondent.

N. S.

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*Devadoss, J.*
*21st November*, 1927.
C. M. P. No. 4396 of 1927.

*Indian Succession Act, S. 302—Disputed claims to estate—Jurisdiction of High Court to give directions to executor.*

Under S. 302 of the Succession Act, the High Court has got jurisdiction to decide contested questions or disputes as to the rights of the legatees on an application by the executor praying for directions.

N R C

*Ch. Raghava Rao* for Applicant.

*P. Satyanarayana Rao* for Respondent.

N. S.

*Beasley, J.*
*22nd November*, 1927. } C. S. No. 57 of 1927.

*Contract—Hiring or sale—Distinction between.*

In the case of a hire purchase agreement, if the hirer has an option to return the thing at any time during the currency of the hire and to be relieved from the obligation of paying further instalments, it amounts to hiring ; else it is a sale.

*C. Narasimhachari* for Plaintiff.

*V. S. Venkataraman* for Defendant.

N. S.

*Ramesam and Jackson, JJ.*
*22nd November*, 1927. } C. M. A. No. 223 of 1927.

*Arbitration—Reference outside Court—Subsequent filing of suit by one of the parties—Suit not stayed—Jurisdiction of arbitrators to pass award.*

Where one of the parties to a reference to arbitration outside court subsequently files a suit in respect of the subject-matter of the arbitration and the suit is not stayed by order of Court, the arbitrators become *functus officio* and have no jurisdiction to go on with arbitration proceedings.

(1912) 3 K. B. 257 and 41 M. 115 : 33 M. L. J. 177 followed.

*T. R. Ramachandra Aiyar* and *S. Muthia Mudaliar* for Appellant.

*T. M. Krishnaswami Aiyar* and *M. Krishna Bharati* for Respondent.

N. S.

*Wallace and Srinivasa Ayyangar, JJ.*
*22nd November*, 1927. } S. A. No. 160 of 1925.

*Madras Estates Land Act, S. 147—Suit for enhancement of rent—Transferee from the registered pattadhar not made a party—If bound by the decision.*

The decision in a suit brought by the landlord against a registered pattadhar for enhancement of rent is binding upon the transferee from the pattadhar even though he was not made a party to the suit.

*M. Patanjali Sastri* for Appellant.

*B. Somayya* for Respondent.

N. S.

*Phillips and Madhavan Nair, JJ.*
*22nd November*, 1927. } Reference No. 8 of 1927.

*Criminal Procedure Code, S. 307—Sessions Judge disagreeing with jury—Reference to High Court—Powers of the High Court.*

The following question was referred to the opinion of a Full Bench :—

" In the case of a reference to the High Court by a Sessions Judge disagreeing with the verdict of the jury, whether the High Court could interfere with the verdict of jury only in cases in which it is manifestly perverse or whether the High Court can go into the whole evidence and decide the case irrespective of the verdict.

*The Public Prosecutor* for the Crown.

*K. Kuttikrishna Menon* for the Accused.

N. S.

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*Phillips and Madhavan Nair, JJ.* *24th November, 1927.* } C. M. A. No. 134 of 1927.

*Compromise decree—Construction—Preliminary or final.*

In a partition suit a compromise decree was passed which provided that the plaintiff was to get ⅙th share of certain properties and that an arbitrator was to be appointed to divide the properties into three shares and one-half of one of these shares should be given to the plaintiff. There was also a further provision that in default of such division by the arbitrator, the plaintiff was entitled to get the properties divided through Court.

*Held*, that this decree was a final decree and consequently executable, even though no prior preliminary decree had been passed.

31 M. 540 and 35 M. 26 referred to. 32 C. 483 dissented from.

*C. S. Venkatachariar* for Appellant.

*T. M. Krishnaswami Aiyar* for Respondent.

N. S.

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*Phillips and Madhavan Nair, JJ.* *25th November, 1927.* } S. A. No. 399 of 1925.

*Civil Procedure Code, S. 100—Question of fact—Question whether a statement in a previous deposition amounts to an acknowledgment of subsisting liability—Limitation Act, S. 19—Implied acknowledgment—Statement that a certain amount was due on a prior date.*

The question as to whether a statement in a previous deposition of the defendant that, on a prior date, about Rs. 100 or 200 were due on the pronote, is one of a subsisting liability on the date of the deposition is one of fact and the High Court will not interfere in second appeal with the findings of the lower courts on the point.

The question whether the statement that a certain amount was due on a prior date without anything more as to whether it was subsequently discharged by payment or not, amounts to an acknowledgment of subsisting liability on the date of the statement, depends on the facts and circumstances of each case.

45 M. 443 : 42 M. L. J. 268 and 46 M. L. J. 1 referred to.

When once a statement is held to be an acknowledgment, it is open to the Court to find that the statements of discharge of portion of

the debt by the defendant are false, as the suit is not based on the acknowledgment but on the original cause of action.

*T. V. Venkatrama Aiyar* and *T. V. Ramanatha Aiyar* for Appellant.

*K. V. Krishnaswami Aiyar* for Respondent.

N. S.

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*Phillips and Madhavan Nair, JJ.*
*28th November, 1927.* — C. M. S. A. No. 133 of 1925.

*Civil Procedure Code, S. 11—Ex-parte order allowing arrest—Judgment debtor adjudicated insolvent on the date of the order—Subsequent application for arrest—Judgment-debtor if precluded from raising the question of exemption from arrest.*

In an execution of a decree an order for arrest was made against the judgment-debtor although he had been adjudicated insolvent on that date under the Provincial Insolvency Act of 1907, the judgment-debtor not appearing and pleading exemption from arrest. In a later execution application praying for arrest of the judgment-debtor, the judgment-debtor pleaded exemption from liability consequent on the order of adjudication.

*Held*, that the fact that the judgment-debtor did not appear and plead the exemption in the former execution petition did not preclude him from raising it now, as the question was purely one of law.

*K. V. Krishnaswami Aiyar* for Appellant.

*C. Krishnamachariar* for Respondent.

N. S.

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*Phillips and Madhavan Nair, JJ.*
*29th November, 1927.* — Crl. R. C. No. 784 of 1927.

*Madras Local Boards Act, S. 221—Erection of pandal without license—Imposition of penalty by Union Board—Application by Union Board to recover penalty—Plea that no fee was payable—Jurisdiction of Magistrate to enquire into.*

A person erected a pandal without the permission of the Union Board. The Board without prosecuting him for not taking a license agreed to license the pandal on payment of a fee and applied to the Sub-Magistrate to collect the same under section 221. The accused raised the plea that no fee was payable, as he had not erected the pandal in contravention of S. 163. The Sub-Magistrate declined to decide this point on the ground that it was not open to him to entertain such a plea.

*Held*, (on a reference by the District Magistrate) that it was not open to the Sub-Magistrate to refuse to entertain the plea and that he had jurisdiction to decide about it.

*Held also*, that as there had been no license, the license-fee payable under the Act could not be said to be due within section 221 and consequently the application by the Union Board was not maintainable.

*The Public Prosecutor* for the Crown.

N. S.

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*Phillips and Madhavan Nair, JJ.*
*29th November, 1927.* — Crl. R. C. No. 633 of 1927.

*Criminal Procedure Code, Ss. 237 and 423—Conviction for an offence under S. 147, Indian Penal Code—Appeal—Appellate Court altering conviction into one under section 323—Legality.*

The accused were charged with rioting under S. 147, I. P. C., and convicted by the Sub-Magistrate. On appeal, the appellate Magistrate held that the rioting was not proved but convicted some of them for the offence of hurt under S. 323, I. P. C.

*Held*, (on revision) that the conviction by the appellate Court was legal, although there was no charge for the offence under S. 323, as the case for the prosecution included the incidents upon which the accused were convicted for hurt.

41 I. C. 828 not followed. 52 I.A. 191 : 6 L. 226 : 48 M.L.J. 643 (P.C.) referred to.

*T. Venkataramana Rao* for Petitioner.

*The Public Prosecutor* for the Crown.

N. S.

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*Devadoss, J.*
*30th November, 1927.* — Crl. R. C. No. 660 of 1927.

*Criminal Procedure Code, Ss. 264, 423—Conviction on summary trial—Appeal—Power of Appellate Court to look into complaint and sworn statement.*

In an appeal from a conviction in a case tried by a magistrate summarily, the appellate Court has no jurisdiction to look into the complaint and the sworn statement, as they do not form part of the record under section 264.

53 C. 738 referred to.

*C. Narasimhachari* for Petitioner.

*The Public Prosecutor* for the Crown.

N. S.

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*Phillips and Ramesam, JJ.*
*30th November, 1927.* — A. S. Nos. 122 and 463 of 1925.

*Civil Procedure Code, O. 1, R. 8—Suit by worshippers for declaration that an alienation of trust properties is not binding on the temple and for possession to be delivered to the trustee—Trustee denying that temple was public—Maintainability of suit—Civil Procedure Code, S. 92—Necessity of sanction under, for such a suit—Act XX of 1863, S. 14—Suit by worshippers for removal of trustees—Decision in, if binding in subsequent suit by other worshippers under O. 1, R. 8, Civil Procedure Code, for declaration that temple is public—Civil Procedure Code, S. 11—Documents not filed in suit—Effect on judgment and decree—Limitation Act, Arts. 134 and 144—Permanent lease of temple property—Adverse possession of lessee.*

Where the plaintiffs as worshippers of the temple filed a suit under O. 1, R. 8, C. P. C., with permission of the court for declaration that

certain properties are trust properties belonging to the temple and that a permanent lease and a mortgage of the said properties were invalid and not binding on the temple, and for possession of the trust properties to be delivered to the first defendant, the trustee of the temple, and the trustee set up in his written statement the plea that the temple and its endowments were his private property and that the permanent lease and mortgage of the endowments were therefore valid and binding on the temple.

*Held* (1) that the suit was not maintainable as it was so framed only with a view to evade the provisions of S. 92, C. P. C.,

(2) that a properly constituted suit under S. 92, C. P. C., should have been brought to remove the trustee and to frame a scheme.

40 M. 212 : 31 M. L. 777 (F.B.) and 41 M. 124 : 33 M. L. J. 357 distinguished.

The decision in a previous suit filed by certain worshippers under S. 14 of Act XX of 1863 for removal of trustee is *res judicata* in a later suit by certain other worshippers under O. 1, R. 8, C. P. C., for declaration that certain temple endowments were public property.

The mere fact that in the previous suit the plaintiffs failed to file into Court certain documents does not amount to gross negligence so as to vitiate the judgment and decree passed in that suit.

13 M. L J, 68 followed.

A permanent lease of temple property which was upheld in a prior suit and under which the lessee in possession asserted a hostile title to the temple for a long time up to the date of the present suit, confers absolute title by adverse possession on the lessee so as to make the present suit barred by limitation either under Art. 134 or Art. 144 of the Limitation Act.

The theory of each successive trustee getting a fresh cause of action at the date of his accession to office as laid down in 48 I.A. 302 : 44 M. 831 : 41 M.L.J. 346 (P.C.) has no application to the case of temples (as the present) as the trustee of a temple, unlike the head of a mutt, has no beneficial interest in the endowment of the temple.

*S. Varadachari*, *V. Krishna Mohan* and *M. Ramachandra Rao* for Appellants in A. S. 122 of 1925.

*The Advocate-General* and *V. Suryanarayana* for Appellants in A. S. 463 of 1925.

*A. Krishnaswami Aiyar*, *Ch. Raghava Rao* and *A. Venkatachellam* for Respondents in both.

N. S.

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*Beasley, J.*

*30th November*, 1927.

C. S. No. 259 of 1927.

*Indian Succession Act, Ss. 3& 4—Provident Fund—Preferentia right of the widow and the children of a subscriber over other persons nominated by the subscriber during his life-time.*

Where there are widow and children left by the deceased subscriber to a provident fund, they are entitled to the benefit of the Fund whatever be the amount subscribed for, regardless of the nominations or assignments made by the subscriber.

*K. Bashyam Aiyangar* for Plaintiffs.

*Pinto* for 2nd Defendant.

*King* and *Partridge* for the Railway Company.

N. S.

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*Ananthakrishna Ayyar, J.*
*1st December*, 1927.
C. R. P. No. 1072 of 1926.

*Negotiable Instruments Act, S. 27—Promissory note by a partner—Amount advanced for the partnership business—Suit on pro-note—Personal decree against the other partner—Legality.*

In a suit on a promissory note executed by one of the partners, the amount advanced having been utilised for the partnership business, it is not illegal for the Court to give a personal decree against the other partner who did not join in the execution of the note.

*S. R. Muthusami Aiyar* for Petitioner.

*K. G. Srinivasa Aiyar* for Respondent.

N. S.

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*Kumaraswami Sastri and Reilly, JJ.*
*1st December*, 1927.
A. S. No. 288 of 1923.

*Limitation Act, S. 7—Alienation by Hindu Father—Eldest son not instituting suit to set aside alienation within three years of attaining majority—Suit by younger sons within three years of their attaining majority—If barred.*

A suit by the younger son of a Hindu Father for partition of the joint family properties after setting aside the alienations made by the father within three years of the attainment of the majority of the younger son is not barred by limitation, although the eldest son who is impleaded as the defendant in the suit did not institute within three years of his attaining majority a suit impeaching the alienations.

38 M. 118 : 25 M. L. J. 405 not followed. 31 A. 156 followed. 51 M. L. J. 845 referred to.

*P. R. Srinivasan* for Appellants.

*K. Bashyam Aiyangar, K. S. Champakesa Aiyangar, R. Gopalasami Aiyangar* and *V. Sundaresa Aiyar* for Respondents.

N. S.

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*Madhavan Nair and Reilly, JJ.*
*1st December*, 1927.
C. M. A. No. 438 of 1926.

*Criminal Procedure Code, S. 476—Order of District Munsiff refusing to make a complaint—Appeal to District Court—Order of District Court reversing the order of the Munsiff—Appeal to High Court—Maintainability.*

A District Munsiff refused to make a complaint in respect of an offence made in the course of a judicial proceeding before him. On appeal, the District Court reversed the order of the Munsiff and directed the making of a complaint—Against this order an appeal was filed to the High Court.

*Held*, that the appeal was not maintainable and that the fact that the order of the District Court was a reversing one was immaterial.

*K. P. M. Menon* for Appellant.

*M. C. Sridhan* for Respondent.

N. S.

*Phillips, J.*
*2nd December*, 1927. } C. R P. Nos 617 to 619 of 1926.

*District Municipalities Act, Ss. 78, 80 and 354—Levy of profession tax without complying with the provisions of Ss. 78 and 80—Civil suit—Maintainability.*

Where a Municipal Council levied profession tax under a resolution passed by it which did not specify the rate or the date of its coming into force and three years later the Council issued a notification that it shall be deemed to have come into force on the date of the resolution.

*Held*, there was no compliance with the provisions of Ss. 78 and 80, that the subsequent notification with a declaration of retrospective operation was illegal and *ultra vires* and a civil suit for the recovery of the tax levied was not barred and that the assessees were not bound to appeal in the first instance to the Council from the orders of the Chairman.

49 M. L J. 542 and 50 M L. J 556 followed.

*A. Satyanarayana* for Petitioner.

*P. Pamini Rao* and *V. Patbhirama Sastri* for Respondents.

N. S.

*Ramesam and Jackson, JJ.*
*6th December*, 1927. } C. M. A. No. 290 of 1925.

*Limitation Act, Art 182, cl. (5)—Transfer of decree to another Court for execution--Subsequent transfer of territorial jurisdiction—Application made thereafter to the Court which passed the decree—' Step in aid.'*

A decree passed by the Sub-Court of Ramnad was transferred for execution to the Sub-Court Madura. Then the properties, subject-matter of the decree, were transferred to the jurisdiction of the newly created Dindigul Court.

*Held*, an application made thereafter to the Ramnad Court is a step-in-aid of execution and would save limitation.

37 M. 231 : 23 M. L. J 236 and 43 I. A. 238 : 39 M. 640 : 31 M. L. J. 300 (P. C.) explained ; 47 B. 56 dissented from ; 89 I. C. 958 approved of ; 50 B. 439 referred to.

*C. S. Venkatachariar* for Appellant.

*K. Rajah Aiyar* and *P. N. Appuswami Aiyar* for Respondent.

N. S

[END OF VOLUME. LIII]